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Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight

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Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight

Scott L. Cummings[†]

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INTRODUCTION

On a map, the city of Inglewood, California, looks like a craggy piece wedged into a jigsaw puzzle. It is one of the eighty-eight separately incorporated cities that give shape to the vast county of Los Angeles,¹ which stretches north-to-south from Lancaster to Long Beach and east-to-west from San Dimas to Santa Monica.² Inglewood is one of the region's larger cities, with more than one hundred thousand residents. It is located inside a freeway-bound rectangle in the southwestern part of Los Angeles, separated by major arterials from Los Angeles International Airport to the west and upscale cities like Beverly Hills and West Hollywood to the north. A historically African American city—a status that has been challenged as of late by the arrival of Latino immigrants³—Inglewood is home to the Hollywood Park horseracing track and the “Fabulous” Forum,

1. See Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 UCLA L. REV. 1783, 1784 (2002).

2. See WILLIAM FULTON, THE RELUCTANT METROPOLIS: THE POLITICS OF URBAN GROWTH IN LOS ANGELES 3 (2001). On Los Angeles's history of decentralized urban planning, see MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 165-69 (1992).

3. Inglewood's population is now evenly split between African American and Latino residents. See Tracy Gray-Barkan, *Southern California's Wal-Mart Wars*, 35 SOCIAL POL'Y 31 (Fall 2004).

which served as an arena for professional basketball and hockey teams through the 1990s and currently houses the Faithful Central Bible Church. The 1999 closure of the Forum as a regular sports venue deprived the city of about \$1 million in annual tax revenue. However, despite this economic blow, the city has retained its working class character, with a median income of just under \$35,000 per year.⁴ As of 2000, Inglewood had only one major supermarket, Vons, within its nearly ten-square-mile city limits.⁵ In this sense, Inglewood was not unique among urban communities, in which ready access to grocery stores and other retail businesses has been a well-documented problem.⁶

Yet it was precisely because Inglewood's profile mirrored that of many other urban communities that Wal-Mart found it an appealing target for its first Southern California "Supercenter."⁷ From an economic standpoint, Inglewood presented a favorable opportunity as an inner city in fiscal need of Wal-Mart's tax revenue boost—and one that housed working class residents who could potentially benefit from Wal-Mart's "always low prices."⁸ From a political perspective, Inglewood was also an attractive locale for urban retail development. It already possessed a large vacant lot adjacent to Hollywood Park that could easily accommodate the Supercenter footprint. And, most critically, Inglewood was *not* part of the city of Los Angeles, which meant that it operated according to its own rules, outside the control of Los Angeles's labor-friendly City Council. Additionally, the fact that Inglewood had a strong African American political base was an important factor because Wal-Mart's urban development strategy emphasized building ties with African American organizations by providing financial contributions.⁹ In short, Wal-Mart officials—eager to expand into the lucrative urban market after years of concentrating on rural development—viewed Inglewood as the ideal test

4. See Inglewood Household Income in 1999, at <http://www.city-data.com/city/Inglewood-California.html>.

5. There was also a Costco, which opened in 1984.

6. See INDUSTRY AT A CROSSROADS: WHAT L.A.'S SUPERMARKET CHAINS AND CITY LEADERS SHOULD DO TO RESTORE GOOD JOBS, INCREASE FOOD ACCESS, AND BUILD HEALTHY COMMUNITIES IN LOS ANGELES 9 (March 2007); Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 357 (2003); see also WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS AND THE NEW SOCIAL POLICY 95 (2001).

7. The Supercenter designation is given to Wal-Mart stores defined by their massive linear space (upwards of two hundred thousand square feet), which allows them to house grocery departments and Wal-Mart's traditional discounted consumer merchandise under one roof. TRACY GRAY-BARKAN, WAL-MART AND BEYOND: THE BATTLE FOR GOOD JOBS AND STRONG COMMUNITIES IN URBAN AMERICA 17 (2007).

8. Nelson Lichtenstein, *Wal-Mart: A Template for Twenty-First-Century Capitalism*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM 3, 4 (Nelson Lichtenstein ed., 2006).

9. See GRAY-BARKAN, *supra* note 7, at 23.

case in a larger campaign announced in 2002 to bring forty Supercenters into California.¹⁰

This is a case study of why Wal-Mart lost its development bid in Inglewood and the role that law—understood broadly as both the tactical deployment of legal advocacy and the codification of legal policy—played in the anti-Wal-Mart campaign. It is, in part, a story about Wal-Mart’s hubris and political miscalculation: the company’s drive for an Inglewood Supercenter failed despite evidence of public support,¹¹ in large measure because of a politically ill-conceived attempt to gain voter approval of its proposed Supercenter through a city initiative that would have completely circumvented the local planning process. Yet Wal-Mart’s Inglewood defeat was not merely self-inflicted. Its miscalculation of the local response to the initiative was politically consequential precisely because there was a sophisticated team of labor activists and lawyers who used Wal-Mart’s disregard of public input to successfully mobilize community opposition to the Supercenter. This Article provides a close account of the labor-backed campaign to stop the development of the Inglewood Supercenter through legislative and legal challenges—a technique known as the “site fight” because of its focus on blocking Wal-Mart at a specific location.¹² As a study of the role of law in the site fight process, it concentrates on how labor and community groups filed a lawsuit to mobilize opposition to Wal-Mart’s Inglewood initiative and redrafted municipal law to limit Wal-Mart’s ability to enter the Los Angeles market.

The aims of this Article are twofold. First, it seeks to understand the site fight in relation to broader shifts within the labor movement, which have driven some unions—particularly those identified with the Change to Win federation that advocates aggressive organizing within communities of color¹³—to promote pro-labor legal reform at the municipal government level. Part I therefore maps the political and economic challenges to traditional labor unionism and shows how these challenges have shaped current efforts at the local level to improve labor standards in key non-exportable industries. Within the retail sector, in particular, it describes why Wal-Mart has become an important target for organized labor and analyzes how the constraints on federally supervised union organizing have operated to prevent the unionization of Wal-Mart stores in the United States. Part I then explores how labor leaders have responded to the limits of traditional unionism by pursuing an alternative model of labor activism

10. See Nancy Cleeland & Debora Vrana, *Wal-Mart CEO Takes His Case to California; He Says the Retailer Erred in Its Aggressive Pursuit of the Crucial Market but Won’t Back Down*, L.A. TIMES, Feb. 24, 2005, at A1.

11. One public poll reported that nearly 80% of Inglewood residents “supported the sale of groceries in Wal-Mart.” Gray-Barkan, *supra* note 3, at 32.

12. See GRAY-BARKAN, *supra* note 7, at vii.

13. See RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE LABOR MOVEMENT 191 (2006).

that uses political opportunities available in the local development process to advocate policy reforms designed to increase union density.¹⁴ This local approach is built upon three pillars: (1) it targets non-exportable service industries tethered to local economies and thus offering strong opportunities for union organizing; (2) it relies on community-labor coalitions to exert political influence within the local development process;¹⁵ and (3) it leverages local opportunities for legal intervention outside the traditional confines of labor law to promote development practices accountable to labor and community stakeholders. Los Angeles, with its dynamic labor movement, has emerged as an important incubator of this local approach and the testing ground for its application to Wal-Mart. To illustrate the dynamics of local labor activism, Part II provides a detailed case study of the defining campaign of the anti-Wal-Mart movement—the Inglewood site fight—in which labor leaders allied with land use and environmental lawyers to oppose Supercenter plans on the ground that the negative community impacts outweighed consumer benefits.

The second goal of this Article is to use the Inglewood site fight to gain critical perspective on the scholarly debate about the role of law in social change processes generally and the relationship between law and contemporary labor organizing specifically. The orthodox view is deeply skeptical of law's potential to produce meaningful, long-lasting social transformation.¹⁶ Critical scholars of the labor movement, in particular, have pointed to the deradicalizing effect of legal reforms such as the National Labor Relations Act on labor activism and the consequent diminution of labor's economic power.¹⁷ However, recent scholarly efforts have reassessed what lawyers can "do for, and to,"¹⁸ social movements and other forms of political mobilization, offering more optimistic accounts that emphasize the constitutive role of law in shaping transformative political ideologies,¹⁹ identifying alternative forms of lawyering that

14. See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 313 (Austin Sarat & Stuart Scheingold eds., 2006).

15. See Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 463-464 (2001).

16. See Orly Lobel, *The Paradox of Extralegal Activism*, 120 HARV. L. REV. 937, 939 (2007). For classic statements of this skepticism, see JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1977); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

17. See Lobel, *supra* note 16, at 944 (summarizing this critical perspective); see also Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 292-93 (1977).

18. Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 14, at 1.

19. See *id.* at 7.

promote community mobilization,²⁰ and linking legal advocacy to labor organizing.²¹

Part III contributes to this critical reassessment by drawing four central lessons from the Inglewood case study. First, in contrast to portraits of lawyers derailing social movements by pursuing rights in court at the cost of grassroots mobilization, the Inglewood case study provides an example of *multi-level legal activism* where lawyers worked in different institutional venues to challenge Wal-Mart site proposals and develop policy reforms. Second, the Inglewood site fight highlights a flexible advocacy model characterized by *tactical pluralism*, in which lawyers helped to advance a coordinated labor campaign using traditional litigation alongside nontraditional skills such as drafting legislation and conducting public relations. Third, the case study reveals the sophisticated ways in which labor client groups operate as consumers of legal services, assembling lawyer teams that contribute *networked expertise* in such areas as land use, environmental, and election law to advance labor organizing objectives. These professional networks cross traditional practice sites and disciplinary categories, while bringing together lawyers whose motivations are sometimes grounded in different political commitments from the activists. Finally, the case study provides an interesting perspective on the problem of *multi-tiered accountability* that arises in the context of low-income community representation, where lawyers must navigate complex relationships with multi-organizational coalitions that, in turn, struggle to represent competing conceptions of community. In Inglewood, the empowered nature of the labor client groups mitigated concerns about strong lawyers manipulating weak clients to achieve their own political objectives: there, the lawyer-client relationships resembled the traditional client-centered model with the lawyers showing great deference to client directives.²² Yet the very strength of the labor groups created its own accountability problems vis-à-vis other coalition members, ultimately complicating the coalition's broad claims to represent the "community" in its struggle against Wal-Mart.

20. See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

21. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 185-236 (2005); Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Workers Centers*, 50 N.Y.L. SCH. L. REV. 465, 471-95 (2005/2006); see also Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 ASIAN L.J. 67 (2005).

22. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (Thomson/West 2d ed. 2004).

I. CONTEMPORARY LEVERS OF LABOR REFORM: CONTESTING WAL-MART AT THE LOCAL LEVEL

Local activism plays out on a political and economic stage shaped by larger systemic dynamics. In the case of Inglewood, the stage was set by a clash between the expansionist impulse of Wal-Mart and the protectionist response by organized labor and its allies. Indeed, Inglewood gained widespread attention precisely because it was emblematic of the larger struggle to redefine labor standards in a deunionized domestic economy. This Part situates the Inglewood site fight within the landscape of this larger struggle, showing how the campaign against Wal-Mart—a global symbol of labor flexibility—evolved as part of an alternative labor strategy to leverage political reforms in local economies, with Los Angeles emerging as a key site of innovation.²³

A. The Terrain of Modern Labor Activism

The story of the Inglewood site fight is part of a larger tale about the declining power of organized labor over the past fifty years as a force for collective worker action. The 1935 passage of the National Labor Relations Act (NLRA) was a crowning accomplishment of the American labor movement, creating a federal structure for facilitating collective bargaining.²⁴ Yet under the auspices of the NLRA regime, organized labor has seen its economic power diminished and union density in the private sector fall from about 40% in the early 1950s to below 10% at the beginning of this century.²⁵ Scholars have offered interrelated political and economic explanations for labor's eroded power.

The *political account* of labor's decline emphasizes how external changes in the regulatory structure of labor relations and internal changes in the management of labor unions have constrained their ability to effectively organize and represent workers in the contemporary marketplace. At the governmental level, the story is one of political backlash against unionism, marked by legislative reforms curtailing the worker-friendly bargaining framework authorized under the original NLRA,²⁶ lax enforcement of management-side labor abuses,²⁷ and court decisions narrowing key provisions of labor law in ways that have

23. See MILKMAN, *supra* note 13, at 3 (calling Los Angeles "a crucible of labor movement revitalization in the 1990s"); see also MIKE DAVIS, MAGICAL URBANISM: LATINOS REINVENT THE BIG U.S. CITY 145 (2000).

24. 29 U.S.C. §§ 150-169.

25. See NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 16 (2002).

26. See Taft-Hartley Act, 29 U.S.C. §§141-197.

27. See Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C.L. REV. 125, 128-29 (2003).

hampered worker organizing.²⁸ These trends have been reinforced by the conservative attack on the social welfare system,²⁹ which has resulted in the unraveling of safety net programs designed to protect workers from economic hardship.³⁰ Unions, for their part, have been criticized for complacency in the face of their New Deal success, relying too heavily on the bureaucratized structure of collective bargaining at the cost of ongoing worker mobilization,³¹ while succumbing to authoritarianism and corruption that has tarred the image of “Big Labor.”³²

The *economic account* of labor’s descent focuses on the macro- and micro-economic reordering that has diminished union power. From a macro-economic perspective, the major shift in the past twenty-five years has been toward greater global economic interdependence, measured in terms of liberalized trade and capital investment regimes, which have weakened the labor movement by reducing the bargaining position of domestically tethered unions vis-à-vis globally mobile capital and promoting regulatory “races to the bottom” in which countries compete for capital investment by lowering labor standards.³³ The well-documented consequences of globalization have included the exportation of labor-intensive (and historically unionized) manufacturing enterprises to low-cost developing countries and the corresponding rise of the domestic service sector, with its heavy reliance on nonunionized immigrant labor.³⁴ These macro-level challenges to organized labor have been reinforced by changes in the internal organization of firms, which have moved away from internal labor markets with the promise of long-term employment and intra-firm promotion toward more “flexible” employment forms, including part-time employment, contingent work, and subcontracting.³⁵ Caught at the intersection of these competing political and economic forces, organized labor in the contemporary era has been confronted with a fundamental dilemma: how to increase union density in non-exportable job sectors—such as retail, construction, hospitality, and other service industries—in the face of economically powerful employers, legally

28. Lobel, *supra* note 16, at 943-44; Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). The Supreme Court’s recent refusal to award back pay to undocumented workers illegally fired in retaliation for union organizing is the most recent in a long line of judicial setbacks for organized labor. NLRB v. Hoffman Plastics, 535 U.S. 137 (2002).

29. See, e.g., CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 7-9 (1984).

30. Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: The Three Challenges to Labor Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 87 (2006).

31. See Klare, *supra* note 17, at 292-93.

32. LICHTENSTEIN, *supra* note 25, at 142-48.

33. See Stone, *supra* note 30, at 85-86.

34. See GORDON, *supra* note 21, at 20-21.

35. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67-86 (2004).

vulnerable workers, and an antiquated regulatory apparatus ill-suited to the job.

B. Organizing Against Bentonville: The Limits of Traditional Unionism

As one of the world's largest companies³⁶—and fiercest union opponents—Wal-Mart has become a compelling symbol of labor's organizing dilemma. Wal-Mart's sheer scale is staggering: its three hundred billion in annual sales constitutes over 2% of the United States gross national product, which ranks it as one of the most dominant businesses in economic history.³⁷ It is this market dominance that makes Wal-Mart at once an appealing target for unionization and, at least thus far, an indomitable adversary.

Wal-Mart's economic power is built upon a retail template that combines low prices with high-volume sales. Wal-Mart founder Sam Walton started his first five-and-dime store in Bentonville, Arkansas, in 1950, and built it into a retail giant by undercutting competitor prices, making up for the lower profit margin per unit by selling far more than other retailers.³⁸ The literature on Wal-Mart's corporate operations emphasizes the benefits of strong centralized managerial control, which allows it to achieve two different types of cost savings.³⁹ First, Wal-Mart's command-and-control structure reduces transaction costs by increasing uniformity, predictability, and speed.⁴⁰ Perhaps most famously, Wal-Mart is known for its ability to regulate the thermostats of all its retail stores from its headquarters in Bentonville.⁴¹ And Wal-Mart's system of monitoring product movement is one of the most sophisticated in the world, capable of tracking products at any point in the chain from supplier to consumer. This system permits the company to move quickly to replenish hot-selling items or reduce orders for unpopular goods at any of its retail locations.⁴² Second, Wal-Mart's central control over its vast network of retail outlets gives it a strong bargaining position in the market for goods and services, allowing it to reduce the costs of supplies and labor. It uses its purchasing power to drive a hard bargain with both domestic and foreign suppliers, who are forced to take the prices that Wal-

36. See AMMETTE BERNHARDT ET AL., WHAT DO WE KNOW ABOUT WAL-MART? AN OVERVIEW OF FACTS AND STUDIES FOR NEW YORKERS, Brennan Center for Justice Economic Policy Brief No. 2, at 1 (Aug. 2005) (reporting 2005 profit figures).

37. See Lichtenstein, *supra* note 8, at 3-5.

38. See Abigail Goldman & Nancy Cleland, *The Wal-Mart Effect: An Empire Built on Bargains Remakes the Working World*, L.A. TIMES, Nov. 23, 2003, at A1.

39. See Lichtenstein, *supra* note 8, at 9-11.

40. There are different types of transaction costs, including the costs of acquiring information, bargaining, and enforcing decisions. See Ronald Coase, *The Nature of the Firm*, 3 ECONOMICA 386 (1937).

41. See Lichtenstein, *supra* note 8, at 11.

42. See *id.*

Mart offers for their goods—or risk losing an enormous customer.⁴³ Similarly, on the labor front, Wal-Mart achieves low prices by enforcing a uniform low-wage, low-benefits standard and protecting against any sign of union activity.

From organized labor's perspective, Wal-Mart's retail structure extracts cost savings from workers and suppliers and distributes them to consumers in the form of lower prices and to investors in the form of higher profits. While this structure may, in fact, increase overall social welfare—indeed, the central debate over Wal-Mart is the degree to which lower prices compensate for lower wages⁴⁴—labor suggests that pitting prices against wages presents a false choice. Contrary to Wal-Mart's claims, labor argues that low prices can coexist with high-wages, pointing to Ford Motor Company as the historical prototype and Costco as the modern exemplar of this combination.⁴⁵ For labor, the issue is therefore how to improve Wal-Mart's meager and (because of its size) industry-setting labor standards, which include average annual earnings of just over \$17,000 for all hourly workers (below the federal poverty line for a family of four) and health insurance plans that cover less than half of Wal-Mart's employees.⁴⁶ Increasing wage and benefit plans would impose its own trade-offs, requiring some combination of lower profits or lower compensation for higher-level corporate employees, assuming prices are held steady.⁴⁷ From labor's perspective, then, the struggle against Wal-Mart centers on redistributing corporate resources away from managers and investors, and toward workers.

The historical approach to the issue of corporate distribution has been unionization, spurred by the ideology of industrial democracy and embodied in the NLRA.⁴⁸ Indeed, United States Steel and General Motors—two other archetypes of American capitalism⁴⁹—set the standard for the manufacturing industry by pairing large-scale economic enterprise

43. See Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COMMERCE 1, 36 (2004); Nancy Cleland et al., *Scouring the Globe to Give Shoppers an \$8.63 Polo Shirt*, L.A. TIMES, Nov. 24, 2003, at A1.

44. See GLOBAL INSIGHT, THE ECONOMIC IMPACT OF WAL-MART (2005) (stating that disposable income has risen nearly one percent as a result of Wal-Mart's reduction in consumer prices); DAVID NEUMARK ET AL., THE EFFECTS OF WAL-MART ON LOCAL LABOR MARKETS (2005) (finding that payrolls per person decline by about 5% after the opening of Wal-Mart stores).

45. See Lichtenstein, *supra* note 8, at 26-27.

46. See BERNHARDT ET AL., *supra* note 36, at 3-4 (noting that those Wal-Mart employees who are covered are forced to pay high premiums and medical deductibles); see also Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES, Oct. 26, 2005, at C1; Bernard Wysocki Jr. & Ann Zimmerman, *Bargain Hunter: Wal-Mart Cost-Cutting Finds a Big Target in Health Care*, WALL ST. J., Sept. 30, 2003, at A1.

47. See Steven Greenhouse, *Parrying Its Critics, Wal-Mart Says Its Wages Must Stay Competitive*, N.Y. TIMES, May 4, 2005, at C1.

48. See LICHTENSTEIN, *supra* note 25, at 30-38.

49. See Lichtenstein, *supra* note 8, at 4.

with traditional unionism.⁵⁰ Though the structure of Wal-Mart's retail operations differs in significant ways from the Taylorist production of General Motors assembly plants,⁵¹ there are many echoes of mid-century industrial organization in Wal-Mart's retail design. Like its industrial predecessors, Wal-Mart is characterized by a large-scale, single-employer workforce of over 1.3 million domestic employees,⁵² who are engaged in relatively routine job functions and subject to a high degree of central managerial control. Though individual Wal-Mart stores do not contain the massive aggregations of workers associated with industrial shop-floor organizing, Wal-Mart stores are nonetheless large physical workspaces, each home to an average of 325 workers.⁵³ In contrast to trends toward outsourcing, franchising, and other forms of flexible corporate design,⁵⁴ Wal-Mart remains the standard-bearer for unitary commercial organization with a massive workforce of similarly situated employees.

This Section examines why the United Food and Commercial Workers (UFCW) union, the major union representing retail and grocery workers, has nonetheless failed to win a single union contract with Wal-Mart, offering explanations rooted in: (1) the system of federal labor law enforcement; (2) Wal-Mart's flexible organizational structure; (3) Wal-Mart's institutional culture; (4) Wal-Mart's anti-union policies; and (5) the UFCW's organizing model.

I. Law

The first explanation is not specific to Wal-Mart, but rather points more generally to changes in labor law that have made union organizing under the NLRA collective bargaining framework more difficult. Though the basic legislative structure of labor law has remained intact for more than four decades, administrative and judicial decisions have impeded private sector union organizing under the National Labor Relations Board (NLRB) supervised election process by permitting uncertainty and delay, curtailing employee free speech, and failing to provide sufficient legal protection against employer anti-union retaliation.⁵⁵ Unions therefore

50. See LICHTENSTEIN, *supra* note 25, at 54.

51. The Taylorist production model was characterized by the scientific management of production processes, whereby workers were assigned to specialized tasks that presaged the subsequent rise of the assembly line mode of production. See DANIEL NELSON, FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT (1980).

52. See Wal-Mart, Economic Opportunity 1-1, at http://www/walmartfacts.com/FactSheets/8292006_Economic_Benefits.pdf.

53. See BERNHARDT ET AL., *supra* note 36 at 1.

54. See Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 516 (2005-2006).

55. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 821 (2005); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 99 HARV. L. REV. 351, 412-19 (1984); see also Eric Tucker, "Great Expectations" Defeated?: *The Trajectory of Collective*

increasingly opt to bypass NLRB supervised union elections altogether in favor of privately negotiated card check neutrality agreements, in which employers agree to recognize a union rather than demand an election if a majority of employees signs valid authorization cards.⁵⁶ Wal-Mart, of course, is virulently opposed to card check agreements and has been cited for its sophisticated deployment of labor law to thwart incipient organizing attempts.⁵⁷ In addition, specific labor organizing rules limit the ability of workers to act collectively. For instance, labor law prohibits “secondary activity,” which means that employees of one company cannot legally boycott another company that is subject to a union organizing drive.⁵⁸ This prohibition reinforces the difficulty of organizing retail outlets like Wal-Mart, since sympathy strikes by transportation unions, like the Teamsters, could exert significant pressure on Wal-Mart by halting the shipments of goods.⁵⁹

2. Organization

Another impediment to union organizing stems from Wal-Mart’s “flexible” labor practices. Wal-Mart has emphasized part-time employment—a policy that it claims helps families that need additional income but also want to retain flexibility to care for their children and attend to household tasks.⁶⁰ The company has thus kept its part-time workforce at about 20% of the total, though it has recently discussed plans to increase the proportion to 40% in an effort to cut costs.⁶¹ Part-time workers tend to have less attachment to the company and experience greater vulnerability—a combination that undercuts incentives to organize. Wal-Mart does, in fact, maintain a functioning internal labor market: most of its higher-level managers are recruited from the ranks of hourly employees.⁶² However, critics charge that company officials keep the criteria for advancement deliberately vague and use broad discretion to

Bargaining Regimes in Canada and the United States Post-NAFTA, 26 COMP. LAB. L. & POL’Y J. 97, 139-140 (2004). Unions lose about half of the board certified elections that they are involved in. See Wendy Zellner, *How Wal-Mart Keeps Unions at Bay: Organizing the Nation’s No. 1 Employer Would Give Labor a Lift*, BUSINESS WEEK, Oct. 28, 2002, at 94.

56. See Brudney, *supra* note 55, at 821.

57. See Part I.B.4, *infra*.

58. See STONE, *supra* note 35, at 210.

59. In addition, Wal-Mart has attempted to place the legal ownership of Wal-Mart stores under separate companies as a way to limit union organizing across stores. See Thomas Jessen Adams, *Making the New Shop Floor: Wal-Mart, Labor Control, and the History of the Postwar Discount Retail Industry in America*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 8, at 213, 219.

60. See Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 161 (N.D. Cal. 2004).

61. See Steven Greenhouse & Michael Barbaro, *Wal-Mart to Add More Part-Timers and Wage Caps*, N.Y. TIMES, Oct. 2, 2006, at A1.

62. See Brad Seligman, *Patriarchy at the Checkout Counter: The Dukes v. Wal-Mart Stores, Inc. Class-Action Suit*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 8, at 231, 237.

promote workers into training programs, resulting in the systematic under-representation of women in management positions.⁶³ In fact, female workers, though they comprise nearly 80% of hourly department heads at Wal-Mart, account for only 40% of those in the coveted management trainee program, which operates as the gatekeeper to higher ranking jobs.⁶⁴ As a result, women workers at Wal-Mart are disproportionately represented in low-paying, high-turnover jobs that are perceived as providing limited upward mobility; the precariousness of their work experience constrains opportunities for union activism.

3. Culture

Observers also point to the Wal-Mart “culture” as an additional barrier to unionization. Wal-Mart has its roots in “right-to-work” states in the Deep South,⁶⁵ where it has cultivated an organizational culture that strongly disdains collective worker action. Employees are referred to as “associates,” a term that evokes responsibility to the common Wal-Mart enterprise, portrayed in terms of familial obligation and small-town communitarianism.⁶⁶ In an effort to promote a team mentality, employees are “coached to achieve their potential,”⁶⁷ while the company promotes an “open-door” policy to encourage dissatisfied employees to air concerns with supervisors instead of channeling grievances into labor organizing.⁶⁸ A strain of anti-unionism is a core component of Wal-Mart’s culture, promulgated through employee literature and meetings that emphasize the dangers of unions, which Wal-Mart portrays as “victimizing” workers by charging dues and depriving employees of their individual voices in the service of self-interested union goals.⁶⁹ The anti-union tenor of Wal-Mart’s culture was nurtured in its early period of small-town and rural development, where it tapped themes of community and service to promote the “Wal-Mart Way” as it fanned outward from Arkansas into adjacent Southern and Midwestern states.⁷⁰

63. See *id.* at 236.

64. See *id.* at 237-38.

65. Right-to-work laws prevent a union from requiring employees to join the union as a condition of employment. See Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 180 (2001).

66. See Lichtenstein, *supra* note 8, at 17.

67. *Id.*

68. See Anna M. Archer, *Shopping for a Collective Voice when Unionization is Unattainable*, 42 Hous. L. Rev. 837, 845 (2005).

69. See Jeffrey A. Botelho, *Who Should Pay the Human Price of “Every Day Low Prices”?*, 18 St. Thomas L. Rev. 825, 841-42 (2006).

70. See Lichtenstein, *supra* note 8, at 14.

4. Policy

Because of its geographic concentration, Wal-Mart was not a key target of organized labor through the 1980s. This began to change in the following decade, as slow growth caused Wal-Mart to aggressively promote Supercenter development further from its Bentonville hub in order to wrest market share from the heavily unionized urban grocery industry.⁷¹ As Wal-Mart clashed with labor activists in these new markets, it implemented aggressively anti-union policies to thwart organizing drives in their early stages. As a formal matter, Wal-Mart has a clear and well-defined response to signs of union activity. The Home Office tells store managers that defending against unions is a “full-time commitment” and gives them explicit directions on how to deal with potential union threats.⁷² Managers are charged with identifying and screening out potentially troublesome employees at the application stage and are required to contact a “Union Hotline” at the first sign of union activity. A call to this Hotline dispatches a team from the Home Office to run a targeted store’s anti-union campaign,⁷³ which consists of mandatory meetings with anti-union presentations and propaganda videos.⁷⁴ Wal-Mart also imposes a strict anti-solicitation policy to prohibit the distribution of union materials within stores.⁷⁵

Moreover, critics have charged Wal-Mart with a tacit policy of intimidating Wal-Mart workers, primarily by firing union activists.⁷⁶ Though such terminations are illegal, the traditional remedy of reinstatement with back-pay usually represents a hollow victory since it is typically awarded well after the union election has been held (and lost). Since 1998, the NLRB has issued nearly one hundred complaints against Wal-Mart for unfair labor practices, including employee terminations, surveillance, interrogations, and unlawful promises or benefits to dissuade organizing.⁷⁷ As a result of Wal-Mart’s anti-union policies, only five Wal-

71. See George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 834 (2006); Zellner, *supra* note 55. Wal-Mart opened its first Supercenter in 1998; by 2003, there were over 1400. See Liza Featherstone, *Rollback Wages: Will Labor Take the Wal-Mart Challenge?*, THE NATION, June 28, 2004, at 11.

72. Botelho, *supra* note 69, at 841 (quoting Wal-Mart management directive).

73. See Archer, *supra* note 68, at 862.

74. See Zellner, *supra* note 55.

75. See Botelho, *supra* note 69, at 843.

76. See NIK THEORETE & CHIRAG MEHTA, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS (2005) (finding that 30% of employers in Chicago study fired workers in union organizing campaigns); see also Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int’l Union, No. 12-CA-20882, 2003 WL 22532371 (N.L.R.B. Div. of Judges).

77. See No Sweat, Briefing: Wal-Mart’s Anti-Union Practices, at <http://www.nosweat.org.uk/node/32>; see also HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART’S VIOLATION OF US WORKERS’ RIGHT TO FREEDOM OF ASSOCIATION 112 (2007), <http://hrw.org/reports/2007/us0507/us0507web.pdf> (“Between January 2000 and July 2005, NLRB

Mart stores in the United States have ever held union elections. In the one instance where the workers voted in favor of the union—in the meat-cutting division at a store in Jacksonville, Texas—Wal-Mart promptly negated the victory by eliminating all of its meat cutting departments nationwide.⁷⁸ More recently, Wal-Mart closed an entire store in Quebec, Canada, after the workers voted for union representation.⁷⁹ There are currently no Wal-Mart stores in North America under union contract, despite a nearly decade-long organizing effort by the UFCW.⁸⁰

5. Labor

While Wal-Mart's anti-union policies have erected high barriers to organized labor, part of the failure of the UFCW to make organizing gains has also been attributed to its own miscues. With Wal-Mart's focus on preventing unionization clear and resolute, commentators have charged the UFCW with failing to respond in kind: it devotes only 2% of its national budget to Wal-Mart and has been criticized for the absence of a national strategy that taps into support for Wal-Mart workers.⁸¹ The UFCW has withdrawn from its store-by-store organizing approach in the United States, focusing instead on domestic public relations and policy campaigns.⁸² However, even critics acknowledge that systematically organizing Wal-Mart would take more resources than the UFCW could itself devote.⁸³ And there are signs that greater coordination among unions to challenge Wal-Mart might be developing, particularly after the 2005 formation of the Change to Win federation, composed primarily of service-sector unions—including the UFCW, UNITE HERE, and the Service Employees International Union (SEIU)—that broke off from the AFL-CIO to emphasize direct union organizing. Nonetheless, labor activists have expressed skepticism that they could win a traditional organizing campaign against Wal-Mart, even with a large infusion of union resources and a

regional directors issued thirty-nine ‘complaints’ against Wal-Mart. The complaints consolidated 101 cases, combining those charges involving the same stores and, in some cases, combining charges against stores located near each other.”).

78. See [Wakeupwalmart.com, The Real Facts About Wal-Mart: Wal-Mart Anti-Union Policy](http://www.wakeupwalmart.com/facts/#anti-union), at <http://www.wakeupwalmart.com/facts/#anti-union>.

79. See Doug Struck, *Wal-Mart Leaves Bitter Pill: Quebec Store Closes After Vote to Unionize*, WASHINGTON POST, Apr. 14, 2005, at E1.

80. However, the UFCW is reportedly close to finalizing its first North American union contract with a Wal-Mart store in Canada. See Doug Cunningham, *UFCW Is Close To Organizing First Wal-Mart In North America*, WORKERS INDEPENDENT NEWS (Oct. 24, 2006), at <http://www.laborradio.org/node/4488>. Wal-Mart has recognized unions in a number of other countries. See Wade Rathke, *A Wal-Mart Workers Association? An Organizing Plan*, in WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM, *supra* note 8, at 261, 262-63.

81. See Featherstone, *supra* note 71.

82. See Rathke, *supra* note 80, at 269.

83. See Featherstone, *supra* note 71.

high-level of inter-union coordination, given the company's vast resources and sophisticated anti-union machinery.⁸⁴

C. Points of Entry: Localism as an Alternative Labor Strategy

In the face of the challenges to traditional unionism, labor leaders in the Wal-Mart context have followed a broader arc of movement activism—driven by the Change to Win unions—turning away from the traditional paradigm of federally supervised union organizing and toward an alternative model emphasizing local coalition building and policy reform designed to increase union density in targeted industries. This turn to localism responds to three central features of the contemporary field of labor activism. First, it targets non-exportable industries tied to local economies—either because they offer inherently immobile services, have fiscal ties to local governments, or gain economic benefits through association with larger regional economies⁸⁵—that offer key opportunities for union organizing. Second, it takes strategic advantage of the spatial configuration of political power, de-emphasizing advocacy within the now more conservative federal government and instead building political alliances with progressive big-city officials who possess the political will to advance regulation on behalf of their low-wage worker constituents. Finally, labor's local strategy provides it with distinct legal levers for advancing union organizing goals that are unavailable at the federal level.

Los Angeles has been an important location in the development of this local approach. It is the site of a dynamic labor movement, propelled forward over the past decade by the dominance of Change to Win unions,⁸⁶ whose historical focus on organizing by occupation has made them well-positioned to respond to the challenges of deindustrialization by focusing on “strategic organizing designed to take wages out of competition in an entire industry or sector.”⁸⁷ An innovative coalition of community groups has supported and extended the work of these unions, building labor's appeal beyond its traditionally narrow focus on the membership. In addition, Los Angeles is also home to the largest concentration of immigrant workers in the United States, who have proven strong supporters of unionism in low-wage sectors.⁸⁸ These factors have coalesced to make Los Angeles “a center of labor movement resurgence”⁸⁹—and the forefront of the anti-Wal-Mart movement.

84. See Rathke, *supra* note 80, at 270.

85. See Stone, *supra* note 30, at 90-92.

86. SEIU Local 1877, in particular, is well-known for its ground-breaking Justice for Janitors campaign. See MILKMAN, *supra* 13, at 155-62.

87. *Id.* at 4-5, 23.

88. See *id.* at 9.

89. *Id.* at 6.

1. Beyond Industrialism: The Service Sector as a Fixed Target

Labor's local approach is built around the goal of organizing the immobile, but rapidly expanding service sector, which over the past fifty years has grown from about 60% of the nonagricultural labor force to roughly 80%.⁹⁰ The service sector is bifurcated between high-paying jobs in financial services, real estate, and the law, and low-wage jobs in the retail, restaurant, hospitality, domestic work, cleaning services, and security fields. The low end of the service sector presents obvious opportunities for union organizing to the extent that it is immune from the threat of export that is used to discipline workers in the manufacturing context. However, this sector also confronts unions with a distinct set of barriers to organizing, including high rates of contingent work, subcontracting, and immigrant labor.⁹¹ In addition, as the Wal-Mart fight shows, though service jobs do not face foreign outsourcing, they are threatened by employer efforts to *import* low-wage standards domestically, through employer support for degraded domestic labor standards and opposition to unionization.

Big cities, in particular, have become important sites for contesting low-wage service employment, given the large population of working poor, which has expanded in connection with the growth of an urban professional class that relies on cheap access to services to support its quality of life.⁹² In Los Angeles, the service sector has driven economic growth over the past two decades, contributing to the expanding number of working poor.⁹³ As of 2000, most of Los Angeles's working poor were concentrated in retail, professional services (education and health care), personal services (hotel and domestic work), business services (janitors and security guards), and construction.⁹⁴ Over 60% of the working poor were foreign-born immigrants,⁹⁵ and less than 5% were unionized.⁹⁶ The occupational concentration of the working poor in the service sector has placed great demands on—and presented new opportunities for—the Change to Win unions that have risen to prominence in Los Angeles.

90. See U.S. GOVERNMENT PRINTING OFFICE, ECONOMIC REPORT TO THE PRESIDENT, Table B46, 374-75 (2002).

91. See, e.g., PAUL MORE ET AL., THE OTHER LOS ANGELES: THE WORKING POOR IN THE CITY OF THE 21ST CENTURY (2000).

92. See SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY (1998); see also DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY (2001).

93. See MORE ET AL., *supra* note 91, at vii (noting that service sector employment increased by nearly 50% between 1985 and 2000, contributing to the growth of the working poor in Los Angeles to approximately one million workers).

94. See *id.* at vii-viii, 35-36.

95. See *id.* at 24.

96. See *id.* at 39.

2. *Beyond Workers: Strategic Solidarity as a Political Strategy*

These unions have responded to the new terrain of low-wage, nonunionized work by attempting to supplement traditional organizing with alternative strategies to build support for unions beyond the direct membership. This effort is designed to help raise labor standards for nonunionized workers and to extend the base of political support for unions. By demonstrating that they can deliver benefits to a broad range of community members, the unions seek to overcome the negative stereotype of labor as a special interest group and improve long-term prospects for increasing union density. While unions continue to hold on to traditional notions of worker solidarity and collective representation, they have also ceded ground to new forms of worker collectivism that break the traditional mold.⁹⁷ These new models are characterized by flexible, pragmatic alliances of workers and activists, who come together in different organizational configurations to advance a range of objectives, including organizing, education, and policy reform.

One way to view these efforts is to arrange them along a spectrum of proximity to organized labor. At one end are groups that operate independently from (and in some tension with) organized labor, while at the other end are organizations with a high degree of functional integration with local unions. Workers' centers—community-based groups that support low-wage workers through service provision, organizing, and advocacy⁹⁸—operate along different points of the spectrum, though the dominant mode of interaction with organized labor is loose and occasional, with only 15% of workers' centers reporting either an ongoing union partnership or union sponsorship.⁹⁹ Since the 1980s, workers centers have grown primarily out of efforts to promote the labor rights of immigrant workers, who initially received a hostile reception by organized labor, which endorsed restrictive immigration policies as a means of fighting what it viewed as the threat to domestic workers that immigrants posed. As a result, most workers' centers grew out of non-labor groups, such as faith-based and identity-based nonprofit organizations.¹⁰⁰ These centers have continued to operate at arm's length from unions, though the formal endorsement of amnesty by the AFL-CIO in 2000 and recent efforts to incorporate day labor centers into the AFL-CIO's central labor councils suggest greater integration is developing.¹⁰¹

97. Cf. STONE, *supra* note 35, at 227 (describing forms of "citizen unionism").

98. See JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 11-12 (2006).

99. See *id.* at 121. Where worker centers have attempted to systematically collaborate with local unions to promote organizing, friction has developed due to the different organizational cultures and sense of mission. See *id.* at 120-30.

100. See *id.* at 15.

101. See Jorge Bustamante, *The AFL-CIO Makes the Right Call This Time: Immigration; The Union's Call for Amnesty for Undocumented Workers Already in the U.S. is a Welcome Approach*, L.A.

Toward the other end of the spectrum are groups deeply connected to organized labor that work to forge community-labor alliances, conduct labor research, enact policy reform, and broaden the base of labor supporters. Labor leaders have promoted community-labor alliances as a national strategy through organizations like Good Jobs First, which was created to build networks of local activists to support labor rights.¹⁰² In addition, unions in major metropolitan areas have sponsored the formation of local labor rights groups, which have mediated between organized labor and other community- and faith-based groups to facilitate strategic action around economic justice issues. One of these groups, the Los Angeles Alliance for a New Economy (LAANE), formed in 1993 by the Hotel Employees and Restaurant Employees (HERE) union, has become nationally known for its innovative labor campaigns, which include securing passage of the Los Angeles Living Wage Ordinance in 1997,¹⁰³ and more recent efforts to promote accountability in publicly subsidized redevelopment.¹⁰⁴ Similar groups have developed throughout California, including the East Bay Alliance for a Sustainable Economy in Oakland and the Center on Policy Initiatives in San Diego. Together with LAANE, these organizations have formed the Partnership for Working Families to advocate for greater social and economic returns on public investments.¹⁰⁵

3. *Beyond Organizing: Law as a Technique of Labor Mobilization*

Labor activists have also turned to legal strategies—including litigation and legislative initiatives—as a way to mobilize workers and enhance labor standards outside of the federal collective bargaining framework. This emphasis on legal strategies represents an interesting convergence between labor organizing and public interest law, which historically have operated at some distance from one another. Part of this distance was the product of the relatively distinct constituencies of

TIMES, Feb. 25, 2000, at B7; Steven Greenhouse, *Labor Federation Forms a Pact with Day Workers*, N.Y. TIMES, Aug. 10, 2006, at A3. Wal-Mart labor strategists have recently offered proposals in favor of developing Wal-Mart Workers Associations based to some degree on the worker centers model. See Rathke, *supra* note 80, at 272.

102. See James B. Goodno, *Feet to the Fire: Accountable Development Keeps Developers and Community Groups Talking—and Walking*, PLANNING (2004), available at <http://www.laane.org/pressroom/stories/ad/ado403planning.html>.

103. See Kathleen Erksine & Judy Marblestone, *The Role of Lawyers in Santa Monica's Struggle for a Living Wage*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 14, at 249, 251.

104. See Cummings, *supra* note 14, at 302.

105. See The Partnership for Working Families, at <http://www.communitybenefits.org/>. Labor-backed groups have frequently collaborated with local branches of national organizing groups like the Industrial Areas Foundation (IAF) and the Association of Community Organizations for Reform Now (ACORN), which have also gained attention for supporting their own versions of innovative worker organizing. The IAF developed the well-known project QUEST in San Antonio to train workers for living wage jobs and has been a notable sponsor of immigrant worker centers, while ACORN has become a leader in the national living wage movements. See FINE, *supra* note 98, at 120; STONE, WIDGETS TO DIGITS, *supra* note 35 at 236; Cummings, *supra* note 15, at 465.

organized labor and public interest lawyers. Historically, public interest lawyers mediated between marginalized groups and the government, helping low-income people gain access to government benefits and people of color gain access to civil rights. To the degree that public interest lawyers confronted workplace problems, it was primarily around the issue of racial discrimination with Title VII becoming an important vehicle in the 1970s and 1980s for impact groups like the NAACP Legal Defense and Educational Fund. Public interest law during this time was more removed from traditional labor law issues, both because labor disputes were primarily the domain of collective bargaining agreements and because workers, to the extent that they were not covered by such agreements, often earned enough money to disqualify them from legal aid.¹⁰⁶ Moreover, scholars have viewed rights-based legal advocacy as in tension with labor struggle, pointing to the legalization of collective bargaining and the pursuit of rights-based employment claims as weakening the labor movement.¹⁰⁷ However, there are signs that contemporary labor activists view legal advocacy as a pragmatic response to the constraints on the traditional union organizing paradigm, supporting litigation to enforce minimum labor requirements, while actively using legal levers embedded in the local development process to promote labor standards.

a. *Law as a Sword*

In the Wal-Mart context, litigation has been used as an important technique to ensure compliance with minimum labor standards—a weapon for exposing intrafirm violations, challenging illegal labor practices, and holding the company to account. Litigation has obvious limits from a labor perspective, since the goal of labor activism is typically to use the collective power of workers to raise standards above the legally mandated floor.¹⁰⁸ However, strategic lawsuits targeted at Wal-Mart labor violations could have a systemic impact to the degree that Wal-Mart's pricing structure requires it to cut legal corners to maintain its low labor costs. For instance, in a widely cited policy, the Wal-Mart Home Office provides detailed budgets to its store managers that set very specific targets for revenues and labor costs;¹⁰⁹ because the labor cost projections are so low, critics charge that store managers are effectively forced to violate labor laws in order to satisfy Home Office standards. Hence, well-known lawsuits have alleged that Wal-Mart fails to provide state-mandated meal

106. There were important exceptions to this division between public interest law and labor issues, including the well-known efforts by the California Rural Legal Assistance program to enforce the labor rights of immigrant farm workers. See Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 17 (1972).

107. See LICHTENSTEIN, *supra* note 25, at 178-211.

108. See GORDON, *supra* note 21, at 178.

109. See Goldman & Cleeland, *supra* note 38.

breaks,¹¹⁰ forces employees to work off-the-clock,¹¹¹ violates child labor laws by requiring minors to work too many hours,¹¹² and contracts with janitorial services that employ undocumented immigrant workers who are denied minimum wage and overtime.¹¹³ To the extent that such litigation can enforce legal baselines that are systematically flouted, Wal-Mart may be forced to reevaluate its pricing and wage policies to ensure ongoing legal compliance. In addition, advocates can coordinate impact cases with a media strategy to publicize wrongdoing in a way that raises the visibility of labor abuse and increases public pressure to reform. Labor unions have generally supported these lawsuits, publicizing them as examples of Wal-Mart's systematic mistreatment of workers.¹¹⁴

The most prominent lawsuit against Wal-Mart is *Dukes v. Wal-Mart*, a gender discrimination suit brought by the Berkeley-based Impact Fund in 2004.¹¹⁵ This lawsuit was certified as the largest class action ever, with the Ninth Circuit affirming the decision to allow a class of over 1.5 million women seeking back pay, punitive damages, and injunctive relief for allegations of unequal pay and unequal promotion.¹¹⁶ *Dukes* is a traditional employment discrimination suit alleging Title VII violations. Yet to the extent that Wal-Mart deploys gender discrimination as a cost-saving measure, a victory in the class action suit could have a large-scale effect in raising wages across the board. The risk, of course, is that the long-winding class action process could dissipate shop-floor activism, as women workers wait for their compensatory checks instead of acting collectively to prospectively change employment practices. While this may be true, commentators and labor activists generally have found complementarities between *Dukes* and worker activism. One perspective emphasizes the second-best nature of the class action as a vehicle for expressing the collective voice of aggrieved Wal-Mart workers in an environment in

110. See Lisa Alcalay Klug, *Jury Rules Wal-Mart Must Pay \$172 Million Over Meal Breaks*, N.Y. TIMES, Dec. 23, 2005, at A22.

111. See Steven Greenhouse, *Wal-Mart Told to Pay \$78 Million*, N.Y. TIMES, Oct. 14, 2006, at C4.

112. See Steven Greenhouse, *In-House Audit Says Wal-Mart Violated Labor Laws*, N.Y. TIMES, Jan. 13, 2004, at A16.

113. See Russell Gold and Ann Zimmerman, *Papers Suggest Wal-Mart Knew of Illegal Workers*, WALL STREET J., Nov. 5, 2005, at A3; see also Ann Zimmerman, *After Huge Raid on Illegals, Wal-Mart Fires Back at U.S.*, WALL ST. J., Dec. 19, 2003, at 1.

114. See, e.g., WakeupWalMart.com, THE REAL FACTS ABOUT WAL-MART: WAL-MART WAGES AND WORKERS RIGHTS, at <http://www.wakeupwalmart.com/facts/>.

115. See David Streitfeld, *It's Berkeley vs. Bentonville as Lawyers Take on Wal-Mart*, L.A. TIMES, June 28, 2004, at A1.

116. *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 MJJ, Order Granting in Part and Denying in Part Motion for Class Certification (N.D. Cal. June 21, 2004), *aff'd* *Dukes v. Wal-Mart, Inc.*, ___ F.3d ___, 2007 WL 329022 (9th Cir. Feb. 06, 2007); see also Lisa Girion & Abigail Goldman, *Wal-Mart Must Face Huge Sex-Bias Suit*, L.A. TIMES, June 23, 2004, at A1.

which more robust union action is impossible.¹¹⁷ A second perspective focuses on the links between *Dukes* and direct action, highlighting how litigation and organizing may be mutually reinforcing. For example, activists suggest that a union-backed campaign to educate Wal-Mart workers on their rights was partly responsible for empowering female employees to come forward to assert claims of discrimination.¹¹⁸ Further, commentators have expressed optimism that the success thus far in *Dukes* represents a highly visible rebuke to Wal-Mart's aura of impregnability that can be used to promote greater solidarity and activism among workers. Just as *Brown v. Board of Education* exposed the vulnerability of the previously untouchable system of Jim Crow, *Dukes* may prove to be a legal opening that sparks further labor activism against Wal-Mart.¹¹⁹

b. Law as a Shield

In contrast to the impact suit, which is a court-focused strategy targeting Wal-Mart's internal labor practices, community-labor coalitions have also sought to reshape local government policy in order to leverage enhanced labor standards. The use of local policy reforms to promote labor rights has emerged as a key strategy of community-labor groups,¹²⁰ which see little prospect for federal labor legislation but can exploit ties with local unions to promote labor-friendly urban policy agendas—in effect, to use local legal reform to shield urban labor constituencies from regressive employer practices. The strategy is enabled by the fact that labor-enhancing local reforms can be embedded in city ordinances governing contracting and land use regulation.

It is important to understand how this community-labor strategy has fit into—and helped to shape—the changing political landscape of community mobilization in urban areas over the past decade. Community-labor groups have gained local influence not simply as conduits of union activism, but as important political actors in their own right—filling a political niche created by the changing dynamics of urban development in the post-civil rights era. Beginning in the 1950s, the fundamental problem in urban areas was massive *disinvestment* from central cities, associated with white flight to the suburbs and urban “blight.”¹²¹ With the advent of

117. See e.g. Archer, *supra* note 68, at 880 (arguing that the class action vehicle is a viable means of obtaining collective voice for Wal-Mart workers unable to form unions).

118. See John Grant, General Counsel, United Food and Commercial Workers, Local 770, Presentation to Problem Solving in the Public Interest Seminar, UCLA School of Law (Nov. 2, 2006).

119. See Ritu Bhatnagar, *Dukes v. Wal-Mart as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L.J. 246, 248 (2004). Of course, the catalyzing effect of Wal-Mart is contingent upon class certification being upheld on appeal.

120. Cf. Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NORTHWESTERN U. L. REV. 1057 (2007).

121. See PETER DREIER ET AL., PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY 99-113 (2001); ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 59-64 (1995).

the War on Poverty, community economic development (CED) became an important strategy for counteracting disinvestment, driven by nonprofit community development corporations (CDCs) that used the resources provided by new federal antipoverty programs to leverage reluctant outside investors.¹²² In this environment, CDCs played critical roles as neighborhood-based developers of affordable housing and commercial real estate projects, and many gained political power as important brokers of urban investment.¹²³

However, over the last decade, the problem in many urban communities has shifted from disinvestment to *hyperinvestment*, fostered by a combination of local government programs promoting city redevelopment and a backlash against urban sprawl. As a result, poor urban communities now face rapidly escalating private development, even speculation, which has driven up real estate values, producing gentrification and the displacement of low-income residents.¹²⁴ This context has challenged conventional CED models since CDCs in hot neighborhoods are often priced out of the real estate market and are no longer needed to spur housing and commercial projects, which are eagerly undertaken by private developers. In the face of hyperinvestment, CDCs have thus seen their role curtailed, while poor communities have had to confront a new dilemma: how to either slow down private investment or condition it on the provision of community benefits like affordable housing and living wage jobs for existing residents. Because this is a question of local policy reform, the central issue is who has sufficient political power to shape local decision making in the interests of low-income residents. In Los Angeles, as well as other big cities, the answer has been organized labor. Thus, community-labor groups have become a proxy for a broad range of urban constituencies frustrated by old antipoverty models and willing to align themselves with organized labor in order to advance a local political agenda with redistributive aims.

As a leader of this community-labor movement, LAANE has gained national prominence by spearheading living wage, accountable development, and big-box retail campaigns in Los Angeles. Beginning with its success in helping to enact the Los Angeles living wage law,¹²⁵ LAANE has focused on promoting living wage ordinances as a way to raise wages above the poverty level. The ordinances have varied in approach, ranging from the more conventional city-wide living wage ordinance, which requires that recipients of public contracts or subsidies

122. See SIMON, *supra* note 6, at 14-34.

123. See HALPERN, *supra* note 121, at 134-35.

124. See Elvin K. Wyly & Daniel J. Hammell, *Islands of Decay in Seas of Renewal: Housing Policy and the Resurgence of Gentrification*, 10 HOUSING POL'Y DEBATE 711, 713 (1999).

125. See L.A., CAL., ADMIN. CODE, art. 11 (2007); CAROL ZABIN & ISAAC MARTIN, *LIVING WAGE CAMPAIGNS IN THE ECONOMIC POLICY AREA: FOUR CASE STUDIES FROM CALIFORNIA* 9 (June 1999).

meet living wage requirements, to the recently passed ordinance mandating that hotels adjacent to the Los Angeles International Airport pay its workers living wage in recognition of the fiscal advantages they have received from public investments in the airport.¹²⁶

LAANE also has been a leader in the “accountable development” movement—an effort to impose higher labor and community benefits standards on developers that receive public assistance to produce commercial and housing projects.¹²⁷ This effort emerged out of an organizing campaign LAANE spearheaded against the developer of the downtown Los Angeles sports and entertainment complex adjacent to the Staples Center. This campaign resulted in a privately negotiated community benefits agreement requiring the developer to provide additional affordable housing, adhere to living wage goals, and agree to card check neutrality.¹²⁸ On the heels of the successful agreement, LAANE advocated that the Los Angeles Community Redevelopment Agency adopt a community impact report policy, which would have required developers within redevelopment project areas to take into account the impact of projects on affordable housing and jobs.¹²⁹ In the face of strong developer opposition, the Community Redevelopment Agency scaled back the policy, instead adopting a “community context report” that provided for weaker reporting requirements.¹³⁰ Groups in other California cities have continued to push for community impact reports, though so far without success.¹³¹

LAANE’s accountable development work has fed into its current campaign to challenge big-box stores, which present similar concerns about local governments approving business development that produces low-wage jobs. LAANE’s Wal-Mart efforts have thus focused on containing big-box retailing through local planning mechanisms. One tactic has been the site fight, which seeks to stop specific development proposals

126. Duke Hefland, *Mayor Signs ‘Living Wage’ Law; LAX-Area Hotels Must Pay Up to \$10.64 Hourly*. *Business Leaders Plan to Take the Issue to Voters*, L.A. TIMES, Nov. 28, 2006, at B4; but see Joe Mathews & Steve Hymon, *Council OKs New Living Wage Law*, L.A. TIMES, Feb. 14, 2007, at B3 (noting that a new living wage ordinance was passed that includes incentives for businesses after the original law was rescinded under pressure from hotels). The hotels have sued to prevent the implementation of the newly passed ordinance. See Joe Matthews & Steve Hymon, *‘Living Wage’ for LAX Hotel Staffs Blocked*, L.A. TIMES, May 5, 2007, at A1.

127. See Cummings, *supra* note 14; Sheila Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999.

128. See Cummings, *supra* note 14, at 321-22; see also JULIAN GROSS ET AL., *COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE* (2005), <http://www.californiapartnership.org/downloads/CBA%20Handbook%202005%20final.pdf>; GREG LEROY & ANNA PURINTON, *COMMUNITY BENEFITS AGREEMENTS: ENSURING THAT URBAN REDEVELOPMENT BENEFITS EVERYONE* (2005).

129. See Cummings, *supra* note 14, at 324.

130. However, the Agency later promulgated underwriting guidelines that require developers receiving Agency support to complete a detailed application that requests much of the information initially sought in the community impact report.

131. See Cummings, *supra* note 14, at 324.

by blocking local land use approval and challenging the environmental soundness of big-box stores. In addition, because the site fight is reactive and resource-intensive,¹³² LAANE has also sought to persuade local governments to pass ordinances restricting big-box development as a way of protecting against the displacement of local businesses and the destruction of housing and green space. These ordinances are intended to influence Wal-Mart either by keeping its Supercenters out of urban areas, and thus protecting higher-wage grocery jobs, or by conditioning Wal-Mart's land use approvals on mitigation measures that would include enhanced wage and benefits standards.

II. BETWEEN LAW AND POLITICS: THE INGLEWOOD SITE FIGHT

Inglewood emerged in 2003 as labor's signature battle against Wal-Mart, led by activists allied with the UFCW and LAANE. This Part examines how the community-labor coalition was able to defeat Wal-Mart's bid to open the first Supercenter in metropolitan Los Angeles.

A. "The No. 1 Enemy": The UFCW's Fight Against the Supercenter "Invasion"¹³³

The struggle over the Inglewood Supercenter was framed by the larger threat that Wal-Mart posed to the unionized grocery sector in California.¹³⁴ In 2003, there were about 250,000 unionized grocery workers in California and national figures indicated that they earned about one and a half times as much as their Wal-Mart counterparts.¹³⁵ Labor leaders at the UFCW were therefore alarmed at the possible entrance of Wal-Mart Supercenters into the California market, which brought with it the potential to drive unionized grocers out of business and force those that remained to make wage and benefits cuts to stay competitive.¹³⁶ Well before Wal-Mart formally announced its plans in 2002 to open forty California Supercenters,¹³⁷ the UFCW was therefore actively working to block Wal-Mart from entering the state. In 1998, union and supermarket industry leaders jointly lobbied for a preemptive statewide ban on big-box retail

132. See Lefcoe, *supra* note 71, at 4.

133. Nancy Cleeland & Abigail Goldman, *The Wal-Mart Effect: Grocery Unions Battle to Stop Invasion of the Giant Stores*, L.A. TIMES, Nov. 25, 2003, at A1 (quoting Rick Icaza, president of UFCW Local 770, as stating that "The No. 1 enemy has still got to be Wal-Mart."); see also Barbara Ehrenreich, Editorial, *Wal-Mart Invades Earth*, N.Y. TIMES, July 25, 2004, at D11.

134. See Merritt Quisumbing, *Choosing Where to Buy Groceries: The High Prices of Wal-Mart's Always Low Prices. Always.* 7 J. L. & SOC. CHALLENGES 111 (2005).

135. Cleeland & Goldman, *supra* note 133; see also Lefcoe, *supra* note 71, at 835 (stating that wages and benefits at Wal-Mart "average about 20-40% less than those of union grocery workers").

136. Cleeland & Goldman, *supra* note 133; see also UFCW, *The Wal-Mart Threat*, at http://www.ufcw.org/take_action/walmart_workers_campaign_info/index.cfm.

137. See Cleeland & Goldman, *supra* note 133; VICKY LOVELL ET AL., INSTITUTE FOR WOMEN'S POLICY RESEARCH, *THE BENEFITS OF UNIONIZATION FOR WORKERS IN THE RETAIL FOOD INDUSTRY* 2 (2002), at <http://www.iwpr.org/pdf/c352.pdf>.

stores that devoted more than 15,000 square feet to the sale of non-taxable items like food and drugs.¹³⁸ The bill passed the Democratic California legislature but then-Governor Grey Davis vetoed it as “anti-competitive and anti-consumer” after being lobbied by powerful Wal-Mart suppliers.¹³⁹

Defeated at the state, the UFCW took its opposition to Wal-Mart to the local government level, where it attempted to build support for policies barring Supercenter development. This local strategy was part of a broader national campaign by the UFCW and allied unions like the SEIU to protect union jobs and reform Wal-Mart’s labor practices by redesigning municipal zoning laws to either preclude Supercenter development or condition it on enhanced labor standards.¹⁴⁰ In Los Angeles, the UFCW Local 770’s initial strategy focused on enacting a city-wide big-box ban—an effort which brought together organizational and legal partners that would play key roles in the subsequent Inglewood campaign. LAANE, in particular, was the central community partner of the UFCW—cementing an alliance forged through prior city-wide labor campaigns. John Grant, in-house counsel for UFCW Local 770 and coordinator of the union’s Wal-Mart campaign, had previously been on the steering committee of the Los Angeles Living Wage Campaign,¹⁴¹ where he met Madeline Janis, the founding director of LAANE.¹⁴² In that campaign, Grant coordinated Local 770’s efforts with LAANE to negotiate the Living Wage Ordinance with City Council members and the City Attorney.¹⁴³ Subsequently, the UFCW and LAANE collaborated on efforts to secure community benefit agreements in Los Angeles, which the UFCW supported as a way to promote the inclusion of unionized groceries in publicly subsidized retail developments.¹⁴⁴

The Los Angeles Living Wage Campaign was also the foundation for the relationship between LAANE and the UFCW’s Berkeley-based lawyer, Margo Feinberg, who had spent nearly two decades at the Los Angeles labor-side law firm Schwartz Steinsapir Dohrman & Sommers, which represented the UFCW, as well as other public and private sector unions.¹⁴⁵ Feinberg was instrumental in drafting the Living Wage Ordinance in Los Angeles and other California cities, and developed an expertise in crafting

138. See Max Vanzi, *Bill Passed to Ban Warehouse Sales of Foods, Drugs*, L.A. TIMES, Sept. 11, 1999, at C1.

139. See Carl Ingram, *Davis Vetoes Ban on Grocery Sales at ‘Big Box’ Stores*, L.A. TIMES, Sept. 23, 1999, at 3; Cleeland & Goldman, *supra* note 133.

140. See Lefcoe, *supra* note 71, at 836.

141. Telephone Interview with John Grant, In-House Counsel, UFCW Local 770, in L.A., Cal. (March 16, 2007).

142. See Zabin & Martin, *supra* note 125, at 9.

143. Telephone Interview with John Grant, *supra* note 141.

144. *Id.*

145. Telephone Interview with Margo Feinberg, Partner, Schwartz Steinsapir Dohrman & Sommers, in Berkeley, Cal. (March 13, 2007).

local ordinances to promote labor standards.¹⁴⁶ Feinberg represented the UFCW and LAANE in their initial efforts to draft a big-box ban in Los Angeles, which was championed in the late 1990s by the legendary progressive City Councilwoman, Jackie Goldberg, who represented Hollywood and other neighborhoods in central and northeast Los Angeles.¹⁴⁷ However, the concept of a complete ban was stalled by the opposition of then-Mayor Richard Riordan, a pro-business Republican; skepticism from Assistant City Attorney Cecilia Estolano, who voiced concerns about the legality of a ban that used land use laws to restrict economic competition;¹⁴⁸ and the resistance of key members of City Council and the City Planning Commission, who were able to weaken the ban in committee by turning it into a set of aesthetic guidelines.¹⁴⁹

The UFCW and LAANE took advantage of the election of Democrat James Hahn as Mayor and a new crop of pro-labor Council members¹⁵⁰ to reintroduce a Los Angeles big-box ban in 2002,¹⁵¹ this time collaborating with Council members Eric Garcetti—who had replaced the term-limited Goldberg—and Ed Reyes—chair of the powerful Planning and Land Use Management Committee—to advance the bill.¹⁵² However, Wal-Mart lobbied hard against the all-out ban,¹⁵³ as did the more union-friendly membership discounter Costco,¹⁵⁴ which chafed against the idea of being lumped in with Wal-Mart given Costco's record of providing higher wages and benefits than its main rival, the membership-based Wal-Mart Sam's Club.¹⁵⁵ In addition, the City Attorney's office continued to express reservations about a ban's legal validity.¹⁵⁶

146. *Id.*

147. *Id.*

148. *Id.*; see also Lefcoe, *supra* note 71, at 860 (stating that courts disfavor land use controls designed to protect local merchants from competition, citing Kenneth H. Young, 1 ANDERSON'S AMERICAN LAW OF ZONING § 7.28, at 805 (4th ed. 1996)).

149. See Gray-Barkan, *supra* note 3, at 36.

150. This group included Antonio Villaraigosa, the former union organizer who in 2004 became mayor, and Martin Ludlow, who served for a brief stint as head of the Los Angeles County Federation of Labor, before he was forced to resign after admitting to fundraising improprieties in his City Council campaign. See Patrick McGreevy & Steve Hymon, *Ludlow Resigns Labor Post, Says He Will Aid Prosecutors*, L.A. TIMES, Feb. 22, 2006, at B1; see also Andy Fixmer, *Proposed Ban Could Thwart Wal-Mart Plan*, L.A. BUS. J., Jan. 5, 2004, at 1 (listing Council members supporting a ban).

151. The ban applied to big-box stores over 150,000 square feet that devoted more than 10% of their floor area to non-taxable items. See Jessica Garrison & Sara Lin, *Wal-Mart vs. Inglewood a Warm-Up for L.A. Fight*, L.A. TIMES, April 2, 2004 at 7; Abigail Goldman, *Wal-Mart Still Raises Concern in Inglewood*, L.A. TIMES, Jan. 10, 2006, at C1.

152. Telephone Interview with Margo Feinberg, *supra* note 145.

153. See Robert Greene, *Thinking Outside the Big Box: L.A.'s New Law to Rein in Wal-Mart Isn't Sweeping, but It May Be Smart*, L.A. WEEKLY, Aug. 13-19, 2004, at 17.

154. Telephone Interview with Margo Feinberg, *supra* note 145.

155. Steven Greenhouse, *How Costco Became the Anti-Wal-Mart*, N.Y. TIMES, July 21, 2005, at BU2.

156. Telephone Interview with Margo Feinberg, *supra* note 145.

In 2003, Los Angeles City Council members Garcetti and Reyes brokered a compromise that backed away from a complete ban and proposed instead only to bar big-box stores slated for designated economically blighted zones,¹⁵⁷ where the city already exercised significant power to regulate private development for public purposes. The new proposal banned big-box stores from being built within one mile of city-defined “Economic Assistance Areas” and carved out an exception for membership clubs selling primarily bulk merchandise (i.e., Costco). It followed on the release of a city-commissioned report from consulting firm Rodino Associates, which found that the entrance of Wal-Mart Supercenters into Los Angeles would have a negative impact on small businesses, increase demands on public services, and drive down grocery sector wages.¹⁵⁸ The City Attorney’s office signed off on this more limited ban,¹⁵⁹ and at the end of 2003 the City Council’s Economic Development Committee voted to direct the City Attorney to draft an ordinance for its review¹⁶⁰—a task undertaken in conjunction with UFCW attorney Margo Feinberg (who had just helped to draft the recently passed Supercenter ban in Alameda County¹⁶¹) working with the union and LAANE.¹⁶² It was widely anticipated that the City Council would vote on the ordinance in early 2004.¹⁶³

However, the timing proved to be unfavorable and the city tabled the geographically limited ban. This was partly due to the newly erupted fissure between the UFCW and major groceries—which had been allies in lobbying for the big-box ban¹⁶⁴—produced by the deepening Southern California grocery strike. In what observers noted as an ironic twist,¹⁶⁵ at

157. Robert L. Gard, *L.A. Looks to Wall out “Superstores”: Buffer Zones Would Prevent Walmart, Others*, PARK LA BREA NEWS/BEVERLY PRESS, Dec. 25, 2003, at 1.

158. Rodino Associates, Final Report on Research for Big Box Retail/Superstore Ordinance (Oct. 28, 2003); see also Nancy Cleland, *City Report Is Critical of Wal-Mart Supercenters*, L.A. TIMES, Dec. 6, 2003, at C1 (“A report commissioned by two Los Angeles city councilmen warns that Wal-Mart Stores Inc.’s Supercenters could harm the local economy and recommends that the company be required to raise its pay and benefits if it wants to operate in the city.”); Jessica Garrison, *Battles Over Mega-Stores May Shift to New Studies; Law Requiring Economic Impact Reports Could Set the Stage for Skirmishes Across Los Angeles*, L.A. TIMES, Aug. 12, 2004, at B1 (“In December, city officials released a \$30,000 study, prepared by the consulting firm Rodino Associates, that said Supercenters—which can run to 200,000 square feet—could harm the local economy, push down wages, strain public services and hurt smaller businesses.”).

159. See Los Angeles City Attorney, Report No. R03-0585, Options for Regulating the Development of Superstores (2003).

160. See Lawrence Kootnikoff, *Wal-Mart Takes on Inglewood Store*, DAILY J., Dec. 24, 2003, at 1.

161. Telephone Interview with Margo Feinberg, *supra* note 145; see also *Alameda County Sued by Wal-Mart*, L.A. TIMES, Jan. 27, 2004, at C3.

162. Telephone Interview with Margo Feinberg, *supra* note 145.

163. See Shirley V. Svorny, *Banning Wal-Mart May Prove Costly*, L.A. TIMES, Jan. 30, 2004, at B15.

164. Telephone Interview with Margo Feinberg, *supra* note 145.

165. See Gray-Barkan, *supra* note 3, at 35.

the very moment that the UFCW was working on a ban to ensure that the threat Wal-Mart posed to unionized groceries never materialized, the major grocery chains (Albertsons, Kroger, and Safeway) invoked the specter of Wal-Mart's "invasion" to call for health care cuts during contract negotiations with the union.¹⁶⁶ The proposed cuts, covering 70,000 workers at over 850 Southern and Central California stores, included a cap on employer health care contributions for existing workers and reduced health care benefits for new workers, effectively creating a two-tiered benefits system.¹⁶⁷ The UFCW's response to the proposal was to call a strike of Safeway stores in October 2003, prompting Albertsons and Kroger, which were bargaining jointly with Safeway, to lock out their union employees in turn¹⁶⁸—thereby precipitating the biggest supermarket strike in Southern California history.¹⁶⁹ Though the UFCW put together a large war chest and mounted a vigorous boycott that lasted over five months and cost the grocery chains \$1.5 billion in sales,¹⁷⁰ the settlement of the strike in March 2004 was viewed as a stinging defeat for the UFCW, which ultimately agreed to a two-tier labor system under which new hires would receive lower pensions, health benefits, and wages.¹⁷¹ While the four-and-a-half month strike temporarily interrupted labor's pursuit of a big-box ordinance in Los Angeles, its unfavorable resolution lent a heightened sense of urgency to the already heated campaign against the proposed Supercenter in Inglewood.

B. Inglewood: The Reluctant Test Case

What became a high-profile fight between labor and Wal-Mart began as a quiet land deal done well before the grocery strike commenced. In 2002, as part of its plan to bring Supercenters to Southern California, Wal-Mart (through its development proxy, Rothbart Development Corporation) purchased an option to buy the largest undeveloped plot of land in

166. See James F. Peltz, *3 Months, and Still No Deal: Latest Grocery Talks Collapse*, L.A. TIMES, Jan. 12, 2004, at A1.

167. See Cleeland & Goldman, *supra* note 133.

168. See Peltz, *supra* note 166.

169. See Garrison & Lin, *supra* note 151; see also Kelly Candaele & Peter Dreier, *A Watershed Strike*, NATION, Oct. 23, 2003, <http://www.thenation.com/doc.mhtml?i=20031110&s=dreier>; Daniel B. Wood, *A Strike That's Struck a Chord Nationwide: Los Angeles Grocery Walkout Taps into Labor Solidarity and Woes of a Shrinking Middle Class*, CHRISTIAN SC. MONITOR, Dec. 11, 2003, at 2.

170. See John O'Dell, *Workers OK Grocery Pact to End Strike*, L.A. TIMES, Mar. 1, 2004, at B1. Safeway reported losses of over \$100 million attributed to the strike. See James F. Peltz, *Safeway Reports \$696 Million Loss; Company Says Red Ink Includes \$103 Million from Strike, Less than Analysts Had Forecast*, L.A. TIMES, Feb. 13, 2004, at C1.

171. See Garrison & Lin, *supra* note 151. Critics charged that the UFCW ran a botched campaign that failed to respond clearly to Wal-Mart's media message (which suggested that the dispute was simply about workers contributing \$5 per week to their own health care) and to nationalize the boycott to respond to the grocery chains' ability to offset losses in California with profits from other states. See Andrew Pollack, *Southern California Grocery Strike Defeated—How Can Labor Pick Up the Pieces?*, FRONTLINE 13, at <http://www.redflag.org.uk/frontline/13/13grocers.html>.

Inglewood: a sixty-acre parcel next to Hollywood Park.¹⁷² The Inglewood site offered Wal-Mart a number of advantages. Inglewood's status as a separately incorporated city within Los Angeles meant that Wal-Mart could enter the metropolitan market while effectively circumventing the need to gain development approval from Los Angeles's labor-friendly local government. In addition, the fact that Inglewood possessed an already assembled sixty-acre site was a crucial advantage given that the absence of sufficiently large parcels had been a significant impediment to Wal-Mart's urban development plans.¹⁷³ Moreover, the identity of Inglewood as an African American working class city was an important feature, which played into Wal-Mart's broader strategy of exploiting tensions between black leaders and organized labor—with its disreputable history of racial discrimination—in order to swing community members in favor of proposed stores.¹⁷⁴ Wal-Mart had already deployed this strategy in Los Angeles, cultivating relationships with local African American leaders in its successful effort to open a traditional Wal-Mart store, without a grocery, in the black community of Baldwin Hills in 2003.¹⁷⁵

Inglewood was not the first Supercenter skirmish in California. In Palmdale, a mid-sized city seventy miles north of downtown Los Angeles, voters approved a measure in 2000 over UFCW opposition to rezone property for a proposed Wal-Mart Supercenter,¹⁷⁶ which later opened as the first Supercenter in Los Angeles County.¹⁷⁷ In 2002, Wal-Mart overturned a city ordinance banning big-box retail development in Calexico, a small border town east of San Diego, though at the time Wal-Mart (which already had a conventional store in the city) had not yet

172. See Nancy Cleeland & Abigail Goldman, *Wal-Mart Trying to Put Plan on Ballot; the Retailer Is Seeking Approval for a New Store in Inglewood from the City's Voters, Not Its Council Members*, L.A. TIMES, Aug. 30, 2003, at A1.

173. Gray-Barkan, *supra* note 3, at 32.

174. See GRAY-BARKAN, *supra* note 7, at 10-11. At the national level, this strategy involved Wal-Mart hiring former civil rights leader and U.S. Ambassador to the United Nations Andrew Young to lead the Working Families for Wal-Mart initiative—a position he left in controversy after he suggested that Jewish, Arab, and Korean shop owners had “ripped off” black communities for years. See Michael Barbaro & Steven Greenhouse, *Wal-Mart Image-Builder Resigns*, N.Y. TIMES, Aug. 28, 2006, at C3.

175. See Garrison & Lin, *supra* note 151. In its Baldwin Hills campaign, Wal-Mart made contributions to local school and youth programs, donated \$10,000 for baseball field lights to a local park, and gave \$3000 to the Urban League, after which its director, John Mack, issued a statement in support of Wal-Mart's “economic benefits.” Cleeland & Goldman, *supra* note 133; see also Gayle Pollard-Terry, *Rallying Around Wal-Mart*, L.A. TIMES, Apr. 2, 2004, Calendar Section, at 22 (citing Mack's support of Wal-Mart).

176. Martha L. Willman & Carol Chambers, *Back at Home, the Issues Were Store, School and Airport*, L.A. TIMES, Nov. 8, 2000, at B1. Not all of Wal-Mart's zoning initiatives passed, however. In particular, Wal-Mart lost rezoning measures in Eureka in 1999 and Yucaipa in 2000. See Mike Anton & Seema Mehta, *Voters Take the Initiative to Control Growth Themselves*, L.A. TIMES, Nov. 12, 2001, at A1; Eric Malnic, *Eureka Voters Reject Plan for Wal-Mart*, L.A. TIMES, Aug. 25, 1999, at A3.

177. Natasha Lee & David Pierson, *L.A. County Gets Its First Wal-Mart Supercenter*, L.A. TIMES, Aug. 31, 2005, at B1.

officially announced plans to roll out a Supercenter.¹⁷⁸ Wal-Mart also gained approvals for Supercenters in California's vast Inland Empire east of Los Angeles.¹⁷⁹ As these developments highlighted, Wal-Mart's early strategy targeted fast-growing outer-lying suburban cities, where retail density was low.¹⁸⁰ This strategy also took advantage of organized labor's relative weakness outside of metropolitan hubs. Although in 2002 the UFCW raised union dues to create a \$3 million war chest to fight Wal-Mart,¹⁸¹ the union was nonetheless forced to select its battles carefully given the magnitude of Wal-Mart's resources and the vast number of cities it could target.¹⁸² As a result, the UFCW generally opted to forgo challenges to small-market suburban Supercenters, saving resources instead for fights in major urban cities with large numbers of unionized workers and politically powerful labor boards.

It was against this backdrop that Inglewood emerged as a pivotal battle in the UFCW's Wal-Mart campaign—a test of organized labor's ability to block Wal-Mart's entrance into the crucial Los Angeles market. Inglewood also represented one of the first coordinated efforts by a community-labor coalition to thwart an already proposed Wal-Mart Supercenter through the process of local development approval, thus offering a proving ground for the effectiveness of the "site fight" technique.

Yet the Inglewood campaign began modestly, with the UFCW driving early strategy and LAANE, at that point still a relatively small organization, reluctant to invest major resources. Wal-Mart's plan to develop the Inglewood site became known in March 2002,¹⁸³ when LAANE researcher Tracy Gray-Barkan, who was monitoring publicly sponsored development projects in Los Angeles in order to target sites for potential community benefits agreements, learned about the land deal through local government contacts.¹⁸⁴ Once Wal-Mart's intentions were

178. Karen Alexander, *Voters Approve 2 'Big Box' Store Plans, Reject 2 Others*, L.A. TIMES, Mar. 7, 2002, at B16. Wal-Mart subsequently developed a Supercenter in Calexico, which opened in 2005. See Calexico Wal-Mart Supercenter Celebrates Grand Opening, May 18, 2005, at <http://www.walmartfacts.com/articles/2139.aspx>.

179. See Seema Mehta, *Wal-Mart Superstores Find Their Niche*, L.A. TIMES, Sept. 10, 2004, at B1 (noting that a Wal-Mart Supercenter had opened in La Quinta and another was slated to open in Hemet).

180. See *id.*; see also Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL L. 9 (2005).

181. See Nancy Cleeland & Abigail Goldman, *Wal-Mart Blocked by Union Lobbying*, L.A. TIMES, Oct. 25, 2002, at C1.

182. See Cleeland & Goldman, *supra* note 133 ("[The site fight] strategy can temporarily save union jobs and give leaders victories to celebrate, but it does little to stop the long-term march of Wal-Mart, critics say. After all, there are 478 cities in California, 88 in Los Angeles County alone.").

183. See Gray-Barkan, *supra* note 3, at 32.

184. Tracy Gray-Barkan, Director of Retail Policy and Senior Research Analyst, Los Angeles Alliance for a New Economy, Presentation to Community Economic Development Clinic, UCLA School of Law (Mar. 21, 2007).

clear, the UFCW and LAANE worked to head off Wal-Mart's development bid, organizing a coalition of community leaders and representatives from the Faithful Central Bible Church that met regularly for several months with Inglewood City Council member Judy Dunlap to devise a strategy.¹⁸⁵ The UFCW also met with Inglewood's Mayor Roosevelt Dorn (who under city law also cast one of five votes on the City Council) and City Council member Lorraine Johnson, who had been recently appointed to fill a vacant council seat.¹⁸⁶ Both indicated their opposition to Wal-Mart.¹⁸⁷

While a number of options were discussed, including the possibility of pressing for a community benefits agreement, the coalition ultimately agreed on pushing for an ordinance banning big-box development in Inglewood.¹⁸⁸ The UFCW's John Grant coordinated community testimony in favor of a ban in front of Inglewood's City Council, while Margo Feinberg helped to draft the ordinance,¹⁸⁹ which in its final form barred retail stores larger than 155,000 square feet that sold more than 20,000 non-taxable items, such as food.¹⁹⁰ In October of 2002, the Inglewood City Council—on a 4-1 vote (with Dunlap, the UFCW ally, opposing on procedural grounds)—passed the ordinance as an emergency measure.¹⁹¹ Wal-Mart immediately condemned the ordinance and moved to initiate a city-wide referendum to repeal it, collecting the required signatures to place the repeal measure on the ballot.¹⁹² In addition, Wal-Mart threatened to sue the city for procedural irregularities associated with the enactment of the ordinance since it was passed on an emergency basis without being drafted by the City Attorney.¹⁹³ Facing an expensive lawsuit and potentially embarrassing referendum, the City Council reversed course and repealed the ordinance on its own accord in December.¹⁹⁴ Mayor Dorn, Council Member Dunlap, and Council member Johnson supported the repeal.¹⁹⁵

In response to this loss, the UFCW sought to tip the balance of power on the City Council against Wal-Mart by backing Ralph Franklin to run

185. See Gray-Barkan, *supra* note 3, at 32.

186. See Jean Merl, *Inglewood Voters Go to Polls, Again; For the Fifth Time in Less than a Year, They'll Choose a District 4 Council Member*, L.A. TIMES, Sept. 14, 2003, at B3.

187. Telephone Interview with John Grant, *supra* note 141.

188. See Gray-Barkan, *supra* note 3, at 32.

189. Telephone Interview with John Grant, *supra* note 141.

190. See Cleeland & Goldman, *supra* note 181.

191. See *id.*; Inglewood, Cal., Ordinance 02-30 (Oct. 22, 2002), available at <http://www.cityofinglewood.org/civica/filebank/blobdload.asp?BlobID=1651>.

192. See Gray-Barkan, *supra* note 3, at 32.

193. See *id.*

194. See Hannah Cho et al., *Inglewood Reverses Itself on Wal-Mart; Following Legal Advice, City Council Abandons Decision to Back Union Bid to Keep Store from Being Constructed*, L.A. TIMES, Dec. 5, 2002, at C4.

195. See Inglewood, Cal., Ordinance 02-35 (Dec. 3, 2002) (repealing Ordinance 02-30).

against the incumbent Johnson in the 2003 Council elections.¹⁹⁶ John Grant coordinated the UFCW's get-out-the-vote drive for Franklin,¹⁹⁷ who eventually won the seat in September after the final election was delayed by a series of legal challenges by Johnson.¹⁹⁸ Franklin's overwhelming victory, coupled with that of anti-Wal-Mart Council member Eloy Morales Jr., gave Wal-Mart foes the upper hand on City Council and placed Wal-Mart on notice that the Council was poised to revisit a big-box ban or, at a minimum, would be unlikely to provide city approvals for its project. LAANE, for its part, increased its organizing activity in Inglewood after the ordinance's repeal, focusing on building support among unionized grocery workers, clergy, community activists, and small business leaders to counter Wal-Mart's quest for development approval.¹⁹⁹

Wal-Mart's next move, however, came as a surprise. In August of 2003, Wal-Mart, through a front group called the Citizens Committee to Welcome Wal-Mart to Inglewood, began to collect signatures to place an initiative on the local ballot for voter approval of a large-scale commercial development on the Wal-Mart owned site (called "The Home Stretch at Hollywood Park") that would include a Supercenter and a Sam's Club.²⁰⁰ The seventy-one page initiative—known as Measure 04-A—sought to amend the city's general land use plan and zoning ordinances to create a commercial zone for the project site (previously zoned for combined commercial/recreational and commercial/residential uses), while also adopting a specific plan spelling out in precise detail "the uses, development standards, criteria, design, signage and landscaping requirements, subdivision requirements, review procedures, exactions, mitigations and other requirements appropriate to the Home Stretch Specific Plan Zone."²⁰¹ If passed, the initiative would mandate the project's exact physical site plan and leaseable space, its sewage and energy requirements, its transportation plan, its signage, and even its landscape design—all without having to go through the typical city land use approval and environmental review process.²⁰² Further, Measure 04-A included provisions that would nullify any "Competing Initiative" passed with fewer

196. See Cleeland & Goldman, *supra* note 133.

197. Telephone Interview with John Grant, *supra* note 141.

198. See Jean Merl, *Franklin Wins Inglewood Council Seat*, L.A. TIMES, Sept. 17, 2003, at B4; Merl, *supra* note 186.

199. See Gray-Barkan, *supra* note 3, at 34.

200. See Proposed Inglewood, Cal., Initiative Measure 04-A [hereinafter Measure 04-A], available at <http://www.cityofinglewood.org/pdfs/Home%20Page/doc.pdf>.

201. Measure 04-A § 12-200.1.B.

202. See Cleeland & Goldman, *supra* note 172; see also Measure 04-A § 12-200.1 G.8 ("The Home Stretch Specific Plan is a comprehensive, stand alone planning document that preempts and replaces all of the standards, criteria, [and] procedures for review....").

votes than Measure 04-A,²⁰³ and stated that once approved by a majority vote, it would take a two-thirds supermajority to repeal.²⁰⁴

This use of the initiative process to gain approval of a comprehensive development plan constituted a new strategy for Wal-Mart, which had till that point generally focused its ballot campaigns on mobilizing voters to strike down previously approved big-box bans or authorizing limited zoning changes.²⁰⁵ By October 2003 Wal-Mart collected more than enough signatures to qualify the initiative for the April 2004 ballot.²⁰⁶ What had begun as a typical skirmish over Supercenter land use approval had grown into a high-profile ballot fight over Wal-Mart's novel attempt to gain comprehensive development approval through Measure 04-A.

C. *The Coalition for a Better Inglewood: Organizing Against Measure 04-A*

The Inglewood campaign moved forward on interrelated organizing and legal tracks. LAANE spearheaded the organizing effort to defeat Measure 04-A, expanding its role in Inglewood dramatically in the fall of 2003 when the UFCW was forced to pull out of Inglewood to devote its resources to full-time work on the grocery strike.²⁰⁷ LAANE, which had already invested significantly in the Inglewood campaign, knew the election would be a difficult fight, given the public's general support of Wal-Mart. However, based on its previous electoral experiences, LAANE believed at least it was on the right side of the ballot in that a "no" vote on Measure 04-A would be easier to get given voters' penchant for preserving the status quo.²⁰⁸ LAANE's major role in the campaign involved forming and supporting the Coalition for a Better Inglewood (CBI),²⁰⁹ comprised of Inglewood residents and government officials, local UFCW workers, and representatives from a number of organizations, including the progressive faith-based group Clergy and Laity United for Economic Justice (CLUE),²¹⁰ the grassroots economic justice group Association of Community Organizations for Reform Now (ACORN),²¹¹ and LAANE

203. Measure 04-A § III.

204. Measure 04-A § VI.

205. WAL-MART WATCH, SHAMELESS: HOW WAL-MART BULLIES ITS WAY INTO COMMUNITIES ACROSS AMERICA 23 (2005).

206. See Gray-Barkan, *supra* note 3, at 34.

207. Telephone Interview with John Grant, *supra* note 141.

208. Presentation by Tracy Gray-Barkan, *supra* note 184.

209. See Gray-Barkan, *supra* note 3, at 35.

210. See Clergy and Laity United for Economic Justice, <http://www.cluela.org> (last visited June 26, 2007).

211. ACORN, or the Association of Community Organizations for Reform Now, is a national membership-based organizing group focused on building power for low- to moderate-income families. See GARY DELGADO, ORGANIZING THE MOVEMENT: THE ROOTS AND GROWTH OF ACORN (1986).

itself.²¹² CBI was built on the organizational foundation laid by the UFCW and LAANE in its early advocacy effort on the Inglewood big-box ban, but was expanded to include new members and infused with new energy as it coalesced around the clear threat of the Wal-Mart initiative.

In Wal-Mart, CBI faced an opponent with a savvy, experienced public relations team that had cultivated key community supporters. In its campaign, Wal-Mart touted the job-creation and sales tax-generating potential of the proposed store—projecting \$3 to \$5 million in new sales tax revenue²¹³—and won endorsements from important local politicians like Mayor Dorn, who argued that Measure 04-A was good for Inglewood because it would create two thousand construction and one thousand permanent jobs.²¹⁴ As in Baldwin Hills, Wal-Mart’s public relations campaign targeted black leaders: the company gave \$300,000 to the NAACP in 2001 and another \$150,000 in 2003, which critics charged contributed to the civil rights organization’s “deafening” silence during the campaign.²¹⁵ Moreover, Wal-Mart orchestrated a sophisticated political campaign in favor of Measure 04-A, spending \$1 million on outreach and mobilization efforts to influence the roughly ten thousand Inglewood voters who would go to the polls.²¹⁶

To counteract Wal-Mart’s efforts, CBI pursued a two-prong strategy for winning the election that emphasized public relations and voter turnout. On the public relations side, CBI worked with Los Angeles-based Democratic political consulting firm SG&A to respond to Wal-Mart’s attempt to cultivate a pro-community image.²¹⁷ Initially, CBI organizers worked to chip away at Wal-Mart’s positive reputation by circulating fact sheets to community members highlighting Wal-Mart’s record of labor abuse.²¹⁸ This effort to negate Wal-Mart’s message of community benefits was adapted for different demographic groups.²¹⁹ The campaign to highlight the costs Wal-Mart imposed on communities was reinforced by

212. The CBI members were Reverend Altagracia Perez, Rev. Jarvis Johnson, Rev. Harold Kidd, Bishop Gregory Dixon, Juanita Ducros, Diane Johnson, Mary Bueno, Cleveland Brown, Cresia Davis, Irene Cowley, Gary Cowley, Gill Mattheiu, Elliott Petty, Danny K. Tabor, Walter Johnson, Eliani Padilla, Sylvia Hopper, Aisha Young, Paulette Francis, Doug Appel, and Lizette Hernandez. See The Southern California Library’s 2005 Annual Dinner, Mover and Shaker Award: Coalition for a Better Inglewood, at <http://www.socallib.org/SCLWebSite/events/dinner05/cbi.html>.

213. See Garrison & Lin, *supra* note 151; Sara Lin, *Wal-Mart and Its Foes Vie for Support*, L.A. TIMES, April 4, 2004, at B1.

214. See Earl Ofari Hutchinson, *Commentary: Inglewood Opens the Wal-Mart Wars*, L.A. TIMES, April 8, 2004, at B15.

215. *Id.*

216. See Wal-Mart Watch, *supra* note 205, at 23.

217. Telephone Interview with John Grant, *supra* note 141.

218. See Tentative Decision, Coalition for a Better Inglewood v. City of Inglewood, No. BS087433 (Feb. 27, 2004).

219. See Gray-Barkan, *supra* note 3, at 35 (noting that CBI’s materials were used to help “shape specific messages for different segments of the community, including homeowners, women, African-Americans, Latinos and union members”).

the late-2003 Rodino report, which found that the entrance of Wal-Mart Supercenters would injure low-income communities by shuttering existing businesses and driving down wages and benefits.²²⁰

Yet, as the election approached, CBI's internal polling data revealed that the message about Wal-Mart's community costs was not gaining sufficient traction and the initiative was still favored by two-thirds of voters.²²¹ Part of CBI's problem was a lack of sufficient funds: LAANE, for example, was able to spend just \$20,000 on its grassroots campaign.²²² The timing of the grocery strike resolution in March 2004 proved fortuitous from a financial perspective, raising the stakes of Inglewood for organized labor, which recognized that a loss there would further erode its already badly damaged credibility as a viable force for grocery worker unionism. The Los Angeles County Federation of Labor gave \$125,000 to support the final phase of the campaign,²²³ and in conjunction with the UFCW and other unions provided crucial logistical and organizational resources.²²⁴

However, labor's important infusion of funds was still limited and did nothing to change the faltering appeal of CBI's arguments about Wal-Mart's cost to the community. About one month before the election, CBI therefore concluded that it needed to change the content of its message to emphasize what polling indicated was the most powerful argument against Measure 04-A: that the initiative circumvented the standard legal process in a way that smacked of an illegitimate power grab by Wal-Mart.²²⁵ In the final stretch of the campaign, CBI organized its media and community education efforts around that theme, using phone banks, community presentations, and press conferences to urge voters to reject Measure 04-A on the ground it allowed Wal-Mart to circumvent its legal obligations. CBI benefited from the sophisticated outreach efforts of experienced community partners in communicating its message: LA Metro, a grassroots organizing affiliate of the Industrial Areas Foundation, helped to convene a town hall meeting,²²⁶ while CLUE organized clergy to add moral weight and appeal to African American and Latino church goers.²²⁷ In addition,

220. Rodino Associates, Final Report on Research for Big Box Retail/Superstore Ordinance (Oct. 28, 2003).

221. See Gray-Barkan, *supra* note 3, at 35.

222. See Garrison & Lin, *supra* note 151.

223. *See id.*

224. *See id.* at 35-36.

225. See Gray-Barkan, *supra* note 3, at 35.

226. *See id.*

227. *See id.* at 36; see also Sara Lin, *Activists Blast Wal-Mart Bid in Inglewood*, L.A. TIMES, March 30, 2004, at B3. Clerics opposed to the initiative included the Southern Christian Leadership Conference, Nation of Islam, and St. Michael's Catholic Church and the Holy Faith Episcopal Churches in Inglewood. See John M. Broder, *Voters in Los Angeles Suburb Say No to a Big Wal-Mart*, N.Y. TIMES, April 8, 2004, at A20; Sara Lin & Monte Morin, *Voters in Inglewood Turn Away Wal-Mart*, L.A. TIMES, April 7, 2004, at A1.

though CBI could not afford to pay for advertising, it was able to gain media attention through radio talk shows and well-placed opinion pieces in major newspapers like the Los Angeles Times.²²⁸ The “Vote No on Measure 04-A” message was also given greater media visibility by the appearance of well-known political figures, such as the Reverend Jesse Jackson and South Los Angeles Congresswoman Maxine Waters,²²⁹ and was communicated through a direct mail effort organized by the Los Angeles County Federation of Labor in conjunction with SG&A.²³⁰

Finally, CBI and its union allies mounted a vigorous get-out-the-vote campaign in the final weeks before the election that was coordinated by the Los Angeles County Federation of Labor and involved CBI member groups LAANE, ACORN, and LA Metro, as well as the UFCW, HERE, and SEIU.²³¹ This effort included intensive door-to-door vote canvassing, precinct walking, and community meetings.²³² Though under-resourced compared to Wal-Mart, CBI was thus able to marshal its limited funds and leverage its substantial community connections to orchestrate a highly visible and multi-faceted electoral campaign that effectively targeted Inglewood’s small pool of likely voters.

D. The Legal Strategy

CBI’s organizing strategy was coordinated with a legal campaign that was designed to give it an opportunity to defeat the Wal-Mart initiative in court, while also reinforcing grassroots efforts to beat Wal-Mart at the ballot box. CBI therefore viewed the legal campaign as part of a comprehensive effort to use all available tools to gain a “win”—in this case, measured by thwarting the Supercenter development. The use of legal tactics as part of a “comprehensive campaign” model was consistent with LAANE’s general approach, which combined organizing, policy advocacy, research, communications, fundraising, and legal advocacy to build progressive political power.²³³

In Inglewood, the legal prong of the campaign—focused on derailing Measure 04-A in court—underscored the centrality of land use and election law in labor’s anti-Wal-Mart movement in California. The opportunity to challenge Wal-Mart at the local level stems from the plenary power of

228. See Editorial, *A Big-Box Ballot Bully*, L.A. TIMES, Mar. 28, 2004, at 4; Patt Morrison, *Can You Hear That, Inglewood?*, L.A. TIMES, Mar. 30, 2004, at B3; see also Gray-Barkan, *supra* note 3, at 36.

229. See Gray-Barkan, *supra* note 3, at 36.

230. See *id.*; Telephone Interview with John Grant, *supra* note 141.

231. See Gray-Barkan, *supra* note 3, at 36.

232. See *id.*; Telephone Interview with John Grant, *supra* note 141.

233. See Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, SHELTERFORCE ONLINE, Issue 144, Nov.-Dec. 2005, at <http://www.nhi.org/online/issues/144/powerinnnumbers.html>; see also GRAY-BARKAN, *supra* note 7, at 37.

cities to control land use planning for the public welfare,²³⁴ which gives them broad discretion over the process of granting development entitlements and codifying general land use plans.²³⁵ Developers generally must go through a local planning commission to obtain key discretionary land use approvals, such as zoning variances and conditional use permits, which the City Council must then approve.²³⁶ The structure of the entitlements process permits well-organized opposition groups with strong political connections to delay or even deny key approvals based on legitimate land use concerns,²³⁷ such as limiting sprawl or preventing incompatible uses. Accordingly, politically influential labor groups can lobby governmental officials to deny land use approvals for Wal-Mart Supercenters, which frequently need zoning changes or amendments to a city's general land use plan to accommodate their massive sites.²³⁸

Another key legal lever in the site fight process is embedded in the process of environmental clearance for development projects. In California, this process centers on the California Environmental Quality Act (CEQA), which requires that a public agency, such as a city's planning commission, evaluate the environmental impact of projects before issuing discretionary development approvals or providing public subsidies.²³⁹ If the public agency determines that the project may have a significant environmental impact, an environmental impact report (EIR) must be prepared and circulated for public comment.²⁴⁰ The final approval of a project may be challenged in court on the grounds that it does not meet the substantive and procedural requirements of CEQA, forcing the agency to repeat the EIR process.²⁴¹ Though it is not possible to defeat a project on the grounds of a defective EIR,²⁴² it is possible to cause costly delays and build additional pressure on local officials to vote against a project if the negative environmental impacts appear to be substantial.

Finally, as the Inglewood example highlighted, the legal framework of the voter-sponsored initiative and referendum process is an important site of contestation over Wal-Mart. In California, voters have a constitutionally guaranteed right to place initiatives (proposing new laws) and referenda

234. See *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 705 P.2d 876, 882 (Cal. 1985); *Associated Home Builders, Inc. v. City of Livermore*, 135 Cal. Rptr. 41, 51 (Ct. App. 1976).

235. See Daniel J. Curtin, Jr., *Regulating Big Box Stores: The Proper Use of the City or County's Police Power and Its Comprehensive Plan—California's Experience*, 6 Vt. J. ENVTL. L. 8 (2004-2005).

236. DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 5-6 (5th ed. 2005).

237. See Lefcoe, *supra* note 71, at 860.

238. See *id.* at 840-42.

239. 14 CAL. CODE REGS § 15002.

240. CAL. PUB. RES. CODE § 21080(d).

241. 14 CAL. CODE REGS § 15230.

242. David Pettit, Partner, Caldwell Leslie Proctor & Pettit, Presentation to Problem Solving in the Public Interest Seminar, UCLA School of Law (Nov. 16, 2006).

(accepting or rejecting previously enacted laws) on state and local ballots,²⁴³ and are specifically authorized to use the process to propose or change land use laws.²⁴⁴ Electoral battles between labor groups and Wal-Mart have generally involved three scenarios:²⁴⁵ (1) Wal-Mart calls a referendum to gain voter approval of land use changes already passed by the city to permit Supercenter development (thereby cutting off union efforts to run anti-Wal-Mart candidates who could reverse the approval);²⁴⁶ (2) Wal-Mart calls a referendum to repeal big-box bans enacted by city legislatures;²⁴⁷ or (3) labor calls a referendum to reject city approvals of land use changes already passed to permit Supercenter development.²⁴⁸ While it is no doubt crucial for Wal-Mart opponents to understand the election law framework in each of these instances, because of legal protections favoring citizen access to the ballot, the key fight is over turning out voters rather than challenging the legal validity of the referendum process itself.

Inglewood Measure 04-A was critically different from these typical referenda cases because it was an initiative put on the ballot by Wal-Mart to gain affirmative and absolute land use approval of its Supercenter plans *before* the city had approved it. The UFCW and LAANE believed that this distinction made the initiative legally vulnerable and began to assemble a legal team to consider a lawsuit soon after Wal-Mart announced that it would gather signatures to place Measure 04-A on the ballot in the fall of 2003.

UFCW Local 770 and LAANE jointly retained Margo Feinberg to coordinate legal strategy.²⁴⁹ Feinberg, an expert in neither land use nor election law, contacted Jan Chatten-Brown, an environmental lawyer who she had known for many years through their work on progressive causes.²⁵⁰ Chatten-Brown was also not an election law expert (and had never challenged an initiative before), but her environmental law and land use background was deemed critical to challenging an initiative that purported to circumvent conventional environmental and land use processes. Her

243. See *DeVita v. County of Napa*, 9 Cal.4th 763, 775 (Cal. 1995) (affirming that “the local electorate’s right to initiative and referendum is guaranteed by the California Constitution, article II, section 11, and is generally co-extensive with the legislative power of the local governing body”).

244. See *id.* at 774.

245. See generally Karen Alexander, *Increasingly, Voters Decide Fate of Big Stores*, L.A. TIMES, March 5, 2005, at B6.

246. This use of the referendum occurred in Palmdale. See Willman & Chambers, *supra* note 176; see also Wal-Mart Watch, *supra* note 205, at 23 (noting also that Wal-Mart won voter approval for a Supercenter in Glendora).

247. This was what happened in Calexico and Contra Costa County. See Alexander, *supra* note 178; Garrison & Lin, *supra* note 151 (noting also that Wal-Mart successfully campaigned for a referendum to repeal a big-box ban in Contra Costa County).

248. See, e.g., *San Marcos Vote Puts End to Second Wal-Mart*, SAN DIEGO TRIB., Mar. 4, 2004, at NC-1.

249. Telephone Interview with Margo Feinberg, *supra* note 145.

250. *Id.*

firm, Chatten-Brown & Associates, was a small public interest law office in Westwood that she had built around representing citizen groups and environmental organizations.²⁵¹ The firm had developed a reputation as a sophisticated environmental boutique with a commitment to liberal public interest causes that, in addition to its fee-generating work for established environmental groups,²⁵² also undertook reduced-fee and pro bono representation for client groups with insufficient resources.²⁵³ Chatten-Brown and her associate, fellow UCLA Law School alumnus Doug Carstens, formally represented both LAANE and CBI, although client communications were generally with LAANE representatives Tracy Gray-Barkan and Lizette Hernandez, and LAANE paid for the legal work on a reduced-fee basis.²⁵⁴

After preliminary discussions with the city over whether Measure 04-A was eligible for the ballot based on procedural concerns about the city's election report, Chatten-Brown's firm focused on analyzing the legality of the initiative from a constitutional and statutory perspective.²⁵⁵ Meanwhile, the UFCW and LAANE assembled a larger team of lawyers to consult on the case. Feinberg was heavily involved in coordinating the team, which included practicing and academic lawyers who were identified for their capacity to contribute relevant expertise and bring legitimacy to the cause.²⁵⁶ One member of this team was David Pettit, a partner at Caldwell Leslie Proctor & Pettit, a small commercial litigation firm in Santa Monica. Also a UCLA Law School alumnus, Petitt started out as a legal aid lawyer,²⁵⁷ and had worked for over a decade at Caldwell Leslie as a land use specialist.²⁵⁸ Petitt had met LAANE director Madeline Janis during LAANE's living wage campaign in Santa Monica and became involved with LAANE in its work on community benefits agreements.²⁵⁹ Petitt joined the Inglewood team as pro bono counsel to LAANE, motivated by a commitment to workers' rights and a concern about the negative impact of Wal-Mart on low-income communities.²⁶⁰ Janis, another UCLA Law School graduate who had done slum housing litigation and worked at

251. Chatten-Brown & Carstens, at <http://cbcearthlaw.com>.

252. See, e.g., CAL. CIV. PROC. CODE § 1021.5 (West 2006) (authorizing court-awarded attorney's fees where a significant benefit . . . has been conferred on the general public or a large class of persons" and "the necessity and financial burden of private enforcement are such as to make the award appropriate").

253. Telephone Interview with Jan Chatten-Brown, Partner, Chatten-Brown & Carstens, in L.A., Cal. (July 26, 2004).

254. Telephone Interview with Jan Chatten-Brown, Partner, Chatten-Brown & Carstens, in L.A., Cal. (March 14, 2007).

255. *Id.*

256. Telephone Interview with Margo Feinberg, *supra* note 145.

257. Presentation by David Pettit, *supra* note 242.

258. Telephone Interview with David Pettit, Partner, Caldwell Leslie Proctor & Pettit, in L.A., Cal. (March 7, 2007).

259. *Id.*

260. *Id.*

commercial powerhouse Latham & Watkins before founding LAANE, was also on the team, where she was joined by famed constitutional law scholar and then-USC law professor Erwin Chemerinsky, and Sean Hecht, recently hired as the Executive Director of UCLA's Environmental Law Center after several years in the environmental division at the California Attorney General's office. One purpose of the legal team, which conferred regularly via conference calls, was to provide additional support for Chatten-Brown by discussing the strength of possible legal challenges and providing feedback on draft arguments.²⁶¹

A key question raised at the outset was whether to file a pre-election challenge to block the initiative or to wait until after the election to sue in the event that Measure 04-A passed.²⁶² Though Chatten-Brown was confident about the potential for winning a post-election challenge, she and other members on the legal team were less sanguine about the prospects of prevailing on pre-election review,²⁶³ given the strong judicial bias against preempting the electoral process absent a clear showing of an initiative's invalidity.²⁶⁴

Nonetheless, the legal team ultimately agreed to pursue a pre-election challenge for two reasons. First, the lawyers and LAANE agreed that they should take advantage of the outside chance to succeed on the merits to shut the initiative down.²⁶⁵ In fact, LAANE was concerned about its ability to win the election outright and thus viewed litigation as perhaps its best chance of ultimately gaining victory in Inglewood.²⁶⁶ Second, LAANE believed that even if the lawsuit proved unsuccessful, it could serve beneficial purposes. An early filing would put Wal-Mart on notice that, even if it won the election, it would face a strong legal challenge that would at the very least tie up the plan in court for some time.²⁶⁷ Moreover, LAANE viewed the lawsuit as a way of generating additional media visibility and grassroots momentum for its voter mobilization efforts.²⁶⁸ Toward this end, Margo Feinberg was able to persuade California Attorney General Bill Lockyer to issue a letter raising legal concerns about the

261. Interview with Sean Hecht, Executive Director, UCLA School of Law Environmental Law Center, in L.A., Cal. (March 15, 2007).

262. Telephone Interview with Jan Chatten-Brown, *supra* note 254.

263. *Id.*; Interview with Sean Hecht, *supra* note 261.

264. See *Brosnahan v. Eu*, 31 Cal.3d 1, 4 (Cal. 1982); *Save Stanislaus Area Farm Economy v. Board of Supervisors of the County of Stanislaus*, 13 Cal.App.4th 141 (1993).

265. Telephone Interview with Jan Chatten-Brown, *supra* note 254; Interview with Sean Hecht, *supra* note 261.

266. See Gray-Barkan, *supra* note 3, at 33.

267. *See id.*

268. *See id.*; see also Dennis Romero, *Walling Off Wal-Mart: Inglewood Activists File Suit to Prevent Their Own Town from Being Wal-Mart-yred in the War over Big-Box Retail*, L.A. CITY BEAT, Dec. 24, 2003, at <http://www.lacitybeat.com/article.php?id=505&IssueNum=29>.

initiative just before the filing of the lawsuit.²⁶⁹ Thus, even if the lawsuit did not prevent the election from going forward, LAANE and the broader coalition believed that the publicity it created would amplify its central argument: that Wal-Mart was attempting to place itself “above the law.”

Chatten-Brown’s firm filed the lawsuit on behalf of CBI and LAANE on December 17, 2003, in Los Angeles Superior Court.²⁷⁰ The lawsuit was styled as a writ of mandate that sought to either prevent the City from submitting the initiative to the electorate or require the County Clerk to remove it from the ballot.²⁷¹ The petition’s complaint centered on the fact that the initiative allowed Wal-Mart to circumvent typical land use approvals and avoid CEQA review. It contained six causes of actions, four of which alleged constitutional violations. The first constitutional claim was that the initiative, by stating that “Competing Initiatives” could only be amended by a two-thirds electoral vote, contravened the California Constitution, which requires a simple majority vote for all initiatives and referenda.²⁷² The second argued that by mandating land use changes to the City of Inglewood—which typically require administrative approvals from the city—the initiative violated a provision of the California Constitution limiting the use of initiatives to legislative matters.²⁷³ The two other constitutional causes of action faulted the initiative for granting Wal-Mart, as a private corporation, specific development rights and for mandating land use changes (such as the closure of specific streets and the elimination of easements) in conflict with state law requirements for land use modifications.²⁷⁴ The petition also included a claim regarding technical violations of the state law governing subdivisions and alleged that the City Clerk had not properly validated the signatures collected in favor of Measure 04-A.²⁷⁵

The court’s decision came in late February 2004. In a brief four-page ruling, the court expressed “doubts as to the validity of some provisions of the Initiative,” but nonetheless held that the petitioners had not made a “clear/compelling showing of invalidity” that would warrant interfering

269. Coalition for a Better Inglewood, Press Release: Lawsuit to Challenge Wal-Mart Ballot Initiative, (Dec. 17, 2003), at <http://www.laane.org/pressroom/releases/walmart031217.html>.

270. See Abigail Goldman, *Wal-Mart Maneuver Draws Suit*, L.A. TIMES, Dec. 19, 2003, at C2.

271. Petition for an Alternative and Peremptory Writ of Mandate; Complaint for Declaratory and Injunctive Relief, Coalition for a Better Inglewood v. City of Inglewood, Case No. BS087433 (Cal. Super. Ct. Dec. 17, 2003).

272. *Id.* at 5-6.

273. *Id.* at 7. At oral argument, Chatten-Brown also contended that the initiative would displace the redevelopment plan in Inglewood by giving land use powers covered by the plan to Wal-Mart. Ruling on Hearing on Petition for Writ of Mandate, Coalition for a Better Inglewood et al. v. City of Inglewood et al., Case No. BS087433, at 4, at 4 (Cal. Super. Ct. Feb. 27, 2004).

274. Petition for an Alternative and Peremptory Writ of Mandate; Complaint for Declaratory and Injunctive Relief, Coalition for a Better Inglewood v. City of Inglewood, Case No. BS087433, at 8-10 (Cal. Super. Ct. Dec. 17, 2003).

275. *Id.* at 7, 10-11.

with “the people’s constitutional right of initiative.”²⁷⁶ The court’s resolution of the petition, though legally disappointing, did not come as a surprise to the legal team or LAANE, which generally credited the lawsuit with providing an important stimulus to the grassroots campaign, attracting widespread national media attention that helped with the final organizing push.²⁷⁷

Once it was clear that Measure 04-A would appear on the ballot, the previously assembled legal team focused on preparing for a post-election lawsuit to invalidate Measure 04-A if it passed. Specifically, the lawyers worked to prepare the full briefing for both a temporary restraining order to immediately halt implementation of the land use changes called for by the initiative and for the substantive challenge on the merits.²⁷⁸ Chatten-Brown’s firm again took the role of lead counsel in drafting the post-election filing, with David Pettit, Margo Feinberg, and Sean Hecht (to a lesser extent) involved in strategy discussions and substantive reviews of the pleadings.²⁷⁹ In addition, Feinberg coordinated an effort to put together lawyers who would file a range of amicus briefs with the court on behalf of organizations opposing the initiative from different legal perspectives. Some of the team members were slated to file amicus briefs: Chemerinsky was to help file a constitutional law brief, while Hecht and Pettit were to help coordinate a land use brief.²⁸⁰ Feinberg was also in discussion with lawyers associated with the Natural Resources Defense Council, labor unions, and historical preservation groups to draft additional briefs.²⁸¹ Feinberg was responsible for identifying the lawyers to draft the briefs and putting together the organizations that would sign on as amici.²⁸² In the weeks leading up to the election, the legal team therefore spent a great deal of energy planning for litigation that its members did not know for sure would ultimately be necessary.²⁸³ Yet the lawyers and organizers did not want to leave anything to chance. And on the eve of the election, with

276. Tentative Decision, Coalition for a Better Inglewood v. City of Inglewood, No. BS087433 (Feb. 27, 2004).

277. See Gray-Barkan, *supra* note 3, at 34; see also V. Dion Haynes, *Wal-Mart Tries End Run Around Balky City*, CHICAGO TRIB., Jan. 12, 2004, at Zone CN8; Daniel B. Wood, *Wal-Mart Rollout—or Rollback?*, CHRISTIAN SCI. MONITOR, Dec. 24, 2003, at USA1.

278. Telephone Interview with David Pettit, *supra* note 258.

279. Telephone Interview with Margo Feinberg, *supra* note 145; Interview with Sean Hecht, *supra* note 261; Telephone Interview with David Pettit, *supra* note 258.

280. Interview with Sean Hecht, *supra* note 261; Telephone Interview with David Pettit, *supra* note 258.

281. Telephone Interview with Margo Feinberg, *supra* note 145.

282. *Id.* Feinberg also spent time before the election coordinating public statements and appearances by other elected officials, like State Assemblyman Jerome Horton. *Id.* Horton campaigned vigorously against Measure 04-A, vowing to sponsor a law “requiring developers to comply with local building and safety codes” in the event the initiative passed. Lin, *supra* note 213.

283. Telephone Interview with Sean Hecht, *supra* note 261.

LAANE deeply pessimistic about the outcome of the vote,²⁸⁴ the pieces of an immediate post-election legal challenge were in place.²⁸⁵

In the end, a post-election lawsuit was rendered moot by the Inglewood voters, who sent Measure 04-A to defeat by a decisive margin (7,049 voting against and 4,575 voting in favor) in the April 6, 2004 special election for the initiative.²⁸⁶ This outcome represented a resounding victory for community-labor action, garnering the anti-Wal-Mart movement national and international media attention.²⁸⁷ It was Wal-Mart's first ballot-box defeat and constituted an embarrassing setback in the company's Southern California expansion plans,²⁸⁸ particularly in light of the fact that Wal-Mart had spent over \$1 million to secure the initiative's passage.²⁸⁹ While CBI's victory did not alter Wal-Mart's interest in the sixty-acre parcel of land in Inglewood or its strong desire to develop it into a Supercenter, the defeat of Measure 04-A complicated Wal-Mart's long-term development plan: with the Inglewood City Council lining up against a Supercenter development,²⁹⁰ it would require a pro-Wal-Mart change in personnel on the Council for the possibility of city approval to re-emerge.

E. From Ballot-Box Victory to Local Policy Reform

The Inglewood victory also had repercussions for the ongoing effort to legally restrict Wal-Mart's ability to enter the Los Angeles city limits, re-igniting stalled legislative efforts to mitigate the negative impacts of big-box development. After Inglewood, the UFCW and LAANE went back to Los Angeles City Council member Eric Garcetti, who had championed the Los Angeles big-box ban, about reintroducing legislation. At this point, however, the idea for the ordinance had shifted from a complete ban toward a softer approach in which retailers would be required to conduct a cost-benefit analysis on a case-by-case basis to show that a proposed big-box store would not have adverse economic impacts on the community.²⁹¹

284. Presentation by Tracy Gray-Barkan, *supra* note 184.

285. Telephone Interview with David Pettit, *supra* note 258.

286. See Lin & Morin, *supra* note 227, at A1; see also LAANE, Inglewood Community Decisively Defeats Wal-Mart Initiative, at <http://www.laane.org/ad/walmart.html>.

287. See Broder, *supra* note 227; Editorial, *Global Retailing: Wal-Mart's Waterloo*, GUARDIAN (London), Apr. 9, 2004, at 25; Jennifer Ordonez, *Wal-Mart Hits a Wall in California*, NEWSWEEK, Apr. 19, 2004, at 54; Christopher Parkes, *California Residents Spurn Wal-Mart Store*, FIN. TIMES OF LONDON, Apr. 8, 2004, at 9; Daniel B. Wood, *California's Chilly Welcome for Wal-Mart*, CHRISTIAN SCI. MONITOR, Apr. 8, 2004, at USA3; *Voters in Inglewood, CA Reject Wal-Mart Superstore*, (transcript of Democracy Now! Radio broadcast, Transcript, Apr. 22, 2004), available at <http://www.democracynow.org/print.pl?sid=04/04/22/150248>.

288. See Jessica Garrison et al., *Wal-Mart to Push Southland Agenda*, L.A. TIMES, Apr. 8, 2004, at B1 (noting that prior to Inglewood, "Wal-Mart had not lost a Superstore fight at the ballot box").

289. See Broder, *supra* note 227.

290. See *Wal-Mart: Aim for Fairness*, L.A. TIMES, Apr. 8, 2004, at B14.

291. See Lefcoe, *supra* note 71, at 846-47.

The cost-benefit analysis approach offered distinct political and legal advantages. Wal-Mart opponents had begun to focus on the economic costs of Wal-Mart as a way to counteract the purported economic benefits of low prices and to gain political traction for legislative efforts to force Wal-Mart to raise wages and health benefits. Thus, a number of labor-sponsored studies were beginning to come out detailing how Wal-Mart's low-wage, low-benefit policies produced "hidden" public costs, measured in terms of the fiscal demands Wal-Mart workers made on taxpayer-financed safety net programs.²⁹² The 2003 Rodino study, though publicly commissioned, arrived at similar conclusions, finding that the benefits of increased jobs and tax revenue provided by Supercenters would be outweighed by the costs to workers, the broader business community, and taxpayers.²⁹³ In addition, labor groups had also started to document the use of public subsidies to finance Wal-Mart's growth.²⁹⁴ As these efforts underscored, organized labor saw a political payoff in using the rigor of economic analysis to justify Wal-Mart regulation.

From a legal standpoint, there was still lingering concern that a court might view any type of big-box ban as an impermissible use of zoning laws to interfere with private business for economic reasons (like protecting labor standards in the grocery industry) unrelated to typical land use concerns (such as preventing blight or reducing traffic).²⁹⁵ Moreover, even if the city made sure to base a ban on legitimate land use grounds, there was the very real possibility that Wal-Mart would nonetheless sue, tying up the ordinance in costly litigation, or challenge the ordinance through a

292. See AFL-CIO, WAL-MART: AN EXAMPLE OF WHY WORKERS REMAIN UNINSURED AND UNDERINSURED (2003); GEORGE MILLER, EVERYDAY LOW WAGES: THE HIDDEN PRICE WE ALL PAY FOR WAL-MART: A REPORT BY THE DEMOCRATIC STAFF OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE (Feb. 16, 2004); UC BERKELEY LABOR CENTER, HIDDEN COSTS OF WAL-MART JOBS: USE OF SAFETY NET PROGRAMS BY WAL-MART WORKERS IN CALIFORNIA (2004); see also AFL-CIO, THE WAL-MART TAX: SHIFTING HEALTH CARE COSTS TO TAXPAYERS (March 2006); BERNHARDT ET AL., *supra* note 36; Wake-Up Wal-Mart, Wal-Mart and Cost to Taxpayers, at <http://www.wakeupwalmart.com/downloads/wal-mart-cost-to-taxpayers-facts.pdf>. Wal-Mart has responded by commissioning its own studies. See GLOBAL INSIGHT, THE ECONOMIC IMPACT OF WAL-MART (2005) (finding that Wal-Mart increased real disposable income by nearly 1%). There have also been attempts by independent researchers to weigh Wal-Mart's economic impact. See David Neumark et al., *The Effects of Wal-Mart on Local Labor Markets* (Nat'l Bureau of Econ. Research, Working Paper No. 11782, 2005), at <http://www.nber.org/papers/w11782> (concluding that Wal-Mart reduces local retail employment by 2 to 4%).

293. The Rodino study elicited a response from Wal-Mart, which paid the Los Angeles County Economic Development Corporation \$65,000 to produce a report finding that Supercenters would increase the overall number of jobs in Los Angeles. Amanda Bronstad, *Wal-Mart Study Has LAEDC Defending Consulting Practice*, L.A. BUSINESS J., Feb. 2, 2004, at 3.

294. See GOOD JOBS FIRST, SHOPPING FOR SUBSIDIES: HOW WAL-MART USES TAXPAYER MONEY TO FINANCE ITS NEVER-ENDING GROWTH (2004); see also DAVID KARJANEN & MURTAZA BUHAMUSA, SUBSIDIZING WAL-MART: A CASE STUDY OF THE COLLEGE GROVE REDEVELOPMENT PROJECT (Nov. 2003).

295. See Lefcoe, *supra* note 71, at 859-66. There were also questions about whether a big-box ban was subject to environmental review under CEQA.

referendum. Indeed, Wal-Mart had sued Alameda County and the City of Turlock over their big-box bans,²⁹⁶ and Wal-Mart had already won ballot-box challenges in Contra Costa and Calexico, indicating that communities might prefer a less intrusive alternative to an absolute ban.²⁹⁷

LAANE, for its part, broke ranks with organized labor to staunchly oppose a ban in Los Angeles, which it argued invited risky litigation and ballot fights.²⁹⁸ As an alternative, LAANE began to advocate for an ordinance requiring retailers to submit an “economic impact analysis” demonstrating the absence of adverse economic impacts prior to big-box approval.²⁹⁹ This idea was roughly modeled on the process for environmental review that had proved to be a potent vehicle for pressing community demands. It also mirrored the community impact report that LAANE had promoted to the Los Angeles Community Redevelopment Agency as part of its accountable development work, but which had been reformulated into a “community context” report to placate developers. While infeasible as a general development requirement, the impact report idea gained traction in connection with discussions about big-box regulation,³⁰⁰ and after the Inglewood fight came to represent a way out of the political and legal impasse created by an absolute big-box ban. Accordingly, the UFCW signed onto the idea of pursuing an economic impact analysis and a revised ordinance was introduced to the City Planning Commission in May 2004.³⁰¹

UFCW lawyer Margo Feinberg took the lead in coordinating with the City Attorney’s office to draft the new ordinance,³⁰² which also received key input from UFCW Local 770’s John Grant, and LAANE’s Madeline Janis and Roxana Tynan (who was LAANE’s Accountable Development Project Director). Given that the group had developed central definitions and concepts in earlier drafts, the major effort involved incorporating a

296. See *Alameda County Sued by Wal-Mart*, L.A. TIMES, Jan. 27, 2004, at C3; Wal-Mart Stores, Inc. v. City of Turlock, 138 Cal.App.4th 273, 284 (Cal. Ct. App. 5th Dist. 2006). Alameda County repealed its ban soon after the suit was filed. See Guy Ashley, *Supervisors Repeal “Big-Box” Ordinance: Alameda County Board Sends Matter Back to the Planning Commission*, CONTRA COSTA TIMES, Mar. 31, 2004, at A03.

297. See Jessica Garrison, *L.A. Council Votes to Restrict Superstores*, L.A. TIMES, Aug. 5, 2004, at B3.

298. See Gray-Barkan, *supra* note 3, at 37.

299. See *id.* at 38.

300. See Gray-Barkan, *supra* note 3, at 38 (“[I]n March, . . . state Senator Richard Alarcon introduced a law (later vetoed by Governor Schwarzenegger) that required local officials to prepare a ‘business impact report’ (BIR) prior to the approval of big box stores over ‘100,000 square feet of gross buildable area’ and ‘more than 10,000 square feet of floor space to be used for selling non-taxable merchandise.’”).

301. See David Greenberg, *Officials Propose New Tactics in Restrictions on Superstores*, L.A. DAILY BUS. J., May 24, 2004, at 7.

302. Telephone Interview with Margo Feinberg, *supra* note 145 (noting that the ordinance formally came from the City Attorney’s office, though the UFCW and LAANE had input into its content).

framework for evaluating the economic impact of big-box stores.³⁰³ In addition to drafting responsibilities, Feinberg testified and prepared other community members to testify at a City Council hearing in order to build a strong public record for the ordinance. She also was involved in briefing the Council on the goals of the ordinance and coordinating with Council member Garcetti's staff on executing changes.³⁰⁴ LAANE staff and UFCW counsel John Grant managed the process of educating Council members and coordinating community input. Grant also mobilized new constituencies in support of the ordinance such as affordable housing groups, like the Southern California Association of Nonprofit Housing, and legal aid lawyers. Despite expressing early hostility,³⁰⁵ Wal-Mart eventually signaled its support once it became clear that the ordinance had the overwhelming support of the City Council.³⁰⁶ After a roughly three months of negotiations and revisions, Los Angeles passed the nation's first "Superstores Ordinance" requiring an economic impact analysis in August 2004.³⁰⁷

The ordinance applies to any "Superstore"—defined as "a Major Development Project that sells from the premises goods and merchandise, primarily for personal or household use, and whose total Sales Floor Area exceeds 100,000 square feet and which devote[s] more than 10% of sales floor area to the sale of Non-Taxable Merchandise"³⁰⁸—that is slated to be located in an Economic Assistance Area.³⁰⁹ These Areas include federal and state enterprise zones and city redevelopment project areas covering much of Los Angeles's low-income communities.³¹⁰ The law makes the development of a Superstore in such an Area contingent on the receipt of a conditional use permit (CUP), which is a land use approval given by the city on a case-by-case basis to potentially objectionable uses.³¹¹ In order to receive a CUP, a Superstore developer must submit an "economic impact analysis" to the city's Community Development Department (or Community Redevelopment Agency if the project is within a

303. There was also a question, raised by representatives from the Westfield mall, about the extent to which the ordinance would cover retail malls. This issue was disposed of by carving out malls from the Supercenter definition. Telephone Interview with Feinberg, *supra* note 145.

304. *Id.*

305. See Jessica Garrison, *City, Wal-Mart Step Up Hostilities*, L.A. TIMES, June 24, 2004, at B10.

306. See Greene, *supra* note 153.

307. See Jessica Garrison, *Los Angeles City Panels Back Plan to Hinder Wal-Mart Stores*, L.A. TIMES, Aug. 5, 2004, at 3; Jessica Garrison, *L.A. Council Votes to Restrict Superstores*, L.A. TIMES, Aug. 11, 2004, at A1; see also Rene Sanchez, *L.A. City Council Considers Putting Lid on Big-Box Retailers*, WASH. POST, Aug. 15, 2004, at A02; Daniel B. Wood, *A New Twist in the Wal-Mart Wars*, CHRISTIAN SCI. MONITOR, Aug. 12, 2004, at USA2.

308. L.A., CAL., MUN. CODE § 12.24(U)(14)(a) (2004). The "Superstore" designation is meant to indicate that the ordinance applies to all big-box stores that meet the statutory definition, not just Wal-Mart Supercenters.

309. § 12.24(U)(14)(a).

310. § 12.24(U)(14)(a).

311. See Lefcoe, *supra* note 71, at 845.

redevelopment zone) specifying whether the store would “have an adverse impact or economic benefit on grocery or retail shopping centers,” “result in the physical displacement of any businesses,” “require the demolition of housing,” destroy park space, displace jobs, impact city revenue, and create other “materially adverse or positive economic impacts or blight.”³¹² The analysis must also specify whether there are measures available to “mitigate any materially adverse economic impacts.”³¹³ On the basis of this report and any information submitted in response, the Community Development Department must make a recommendation to the City Planning Commission as to whether the proposed store would result in a “materially adverse economic impact” and, if so, whether there are any mitigation measures available.³¹⁴ In order to give final approval to the project, the City Planning Commission then must conclude that no irremediable adverse impacts exist—a determination that is appealable to the full Los Angeles City Council.³¹⁵

The ordinance aims to set a high bar for Superstore admission into Los Angeles by requiring the city to create a public record, based on empirical evidence, that the economic benefits of a store will in fact outweigh the costs. In practice, it has generated a cottage industry of consultants who produce reports on both sides of the Wal-Mart divide, touting the benefits or condemning the costs depending on the perspective of the commissioning group.³¹⁶ The ordinance therefore does not eliminate politics from the siting decision, but rather channels it into an impact analysis process that places labor activists on a stronger footing than if they were left solely with the pre-existing land use entitlement and environmental review standards. In particular, the economic impact analysis requirement provides a politically legitimate way for City Council members to oppose Wal-Mart because of concerns about its labor practices and negative community effects. Moreover, the structure of the ordinance, which only compels the production of information about the economic impact of Superstores, is designed to be less vulnerable to legal attack than a flat ban on big-box stores.

Of course, passage of the Los Angeles Superstores Ordinance did not affect the status of developments in Inglewood, which remained an active big-box site after the 2004 ballot initiative. In fact, in early 2005, Wal-Mart formally purchased the sixty-acre site it had previously held on option,³¹⁷ and it was widely expected that the company would renew its Supercenter

312. L.A., CAL., MUN. CODE § 12.24(U)(14)(d)(2)(i)-(ix).

313. § 12.24(U)(14)(d)(2)(x).

314. § 12.24(U)(14)(d)(3).

315. § 12.24(U)(14)(d)(1).

316. Presentation by David Pettit, *supra* note 258.

317. See Abigail Goldman, *Wal-Mart Still Raises Concern in Inglewood*, L.A. TIMES, Jan. 10, 2006, at C1.

proposal that year.³¹⁸ In response, community leaders, including California State Assemblyman Jerome Horton and Council member Ralph Franklin, initially urged Wal-Mart to accept a community benefits agreement in exchange for permission to build—a proposal that Wal-Mart rebuffed.³¹⁹ Subsequently, the UFCW and LAANE went back to Inglewood with a conscious strategy of adapting the Los Angeles Superstores Ordinance to Inglewood in order to provide an additional layer of protection from big-box development.³²⁰ Inglewood City Council member Franklin sponsored the Inglewood ordinance, but while he had the support of the Inglewood City Council, the Mayor and City Attorney opposed the effort. As a result, Franklin circumvented the City Attorney, instead directing the city's planning division to send to the full Council a proposal that tracked the Los Angeles Ordinance.³²¹ Feinberg, on behalf of the UFCW and LAANE, helped to draft the Inglewood ordinance, which when it passed in July 2006, mirrored its Los Angeles counterpart by requiring big-box developers to pay for an economic impact analysis before building permits could be approved.³²²

F. The Inglewood Effect: Echoes of Wal-Mart Activism

The adoption of Superstores Ordinances in Los Angeles and Inglewood capped nearly five years of lobbying, organizing, and legal advocacy by the UFCW and LAANE, and constituted legal codification of their campaign to thwart Wal-Mart's entry into metropolitan Los Angeles. When measured against the benchmark of stopping Wal-Mart from penetrating the Los Angeles market, the campaign was by all accounts a resounding success. Wal-Mart has yet to open a Supercenter in Los

318. See LAANE, Inglewood Campaign: Ensuring Community Control Over Development Decisions in Key Southland City, at <http://laane.org/projects/inglewood/index.html>.

319. See Ronald D. White, *Inglewood Delegation Tries to Air Concerns at Wal-Mart Conference*, L.A. TIMES, April 6, 2005, at C2; Coalition for a Better Inglewood, Press Release, Inglewood, CA Leaders Urge Wal-Mart Chief to Invest in Employees and Communities—Not PR, April 5, 2005 (on file with author).

320. Telephone Interview with Margo Feinberg, *supra* note 145.

321. See Abigail Goldman, *Wal-Mart Still Raises Concern in Inglewood*, L.A. TIMES, Jan. 10, 2006, at C1.

322. See Josh Grossberg, *Inglewood Law Scrutinizes Superstores: A New Ordinance Makes It Even More Difficult for Potential Big Boxes to Build by Requiring Them to Pay for an Economic Impact Analysis*, DAILY BREEZE, July 13, 2006, at A3. There were two differences of note in the Inglewood ordinance. First, it dealt with the possibility that Wal-Mart might attempt to circumvent the ordinance's minimum square footage requirement by placing two smaller stores side-by-side, prohibiting stores from being within 300 feet of one another. See *When One is Too Much, build Two*, L.A. TIMES, March 14, 2005, at C3; cf. OAKLAND, CAL., MUN. CODE § 17.09.040 (avoiding this problem by aggregating square footage of adjacent stores that share common management, check stands, warehouses, distribution). Second, it provided that the restrictions would apply retroactively in the event that Wal-Mart succeeded in gaining approval before the Ordinance formally passed. Presentation by Tracy Gray-Barkan, *supra* note 184.

Angeles or Inglewood, and the cities' ordinances hold the unique distinction of having avoided legal challenge from the retailer.

The aftermath of the Inglewood fight, however, has underscored the elusiveness of Wal-Mart and the complexities of coordinating a labor movement on a city-by-city basis. Wal-Mart, for its part, appears to have taken two lessons from its experiences in Inglewood and Los Angeles. As a policy matter, Wal-Mart has placed less emphasis on targeting Supercenter development in major cities where powerful labor boards have raised the costs of entry.³²³ Wal-Mart therefore has made no effort to come into Los Angeles through the economic impact analysis process set up by the Superstores Ordinance, and has refocused development away from other union strongholds like Chicago, whose City Council passed a living wage ordinance applicable to big-box stores (that was vetoed by the Mayor),³²⁴ and New York.³²⁵ In turn, Wal-Mart has pursued a two-tiered strategy, focusing on the international market,³²⁶ while continuing to vigorously press development plans in small domestic cities where it can use its superior resources to wear down local resistance.³²⁷ In Inglewood, for instance, Wal-Mart has not conceded the Supercenter fight, currently supporting two pro-Wal-Mart City Council candidates in order to ultimately overturn the existing ordinance.³²⁸

As a tactical matter, Wal-Mart has avoided proposing any new initiatives preempting local planning, which backfired in Inglewood.³²⁹ Instead, it has followed the approach it pursued successfully before Inglewood, focusing on working behind the scenes to secure city approval for Supercenter developments, while referendizing or litigating city big-box bans.³³⁰ Its success in this regard has been mixed. Wal-Mart did achieve a significant post-Inglewood victory in Rosemead, a small city ten miles east of Los Angeles, where Wal-Mart successfully lobbied the City

323. See Dan Levine, *Wal-Mart's Big City Blues*, NATION, Nov. 24, 2003, <http://www.thenation.com/doc/20031208/levine>.

324. See *Council Fails to Override Veto of Living Wage*, L.A. TIMES, Sept. 14, 2006, at A18; Chi. Living Wage Ordinance, available at <http://www.wakeupwalmart.com/community/ChicagoLivingWage.pdf>.

325. See Michael Barbaro & Steven Greenhouse, *Wal-Mart Chief Writes Off New York*, N.Y. TIMES, March 28, 2007, at C1.

326. See Alan Clendenning, *Wal-Mart Adds 140 Brazil Stores to Roster*, S.D. UNION-TRIB., Dec. 15, 2005; Evelyn Iritani, *Unions Go Abroad in Fight with Wal-Mart*, L.A. TIMES, Aug. 24, 2005, at A1.

327. See Wal-Mart Watch, *supra* note 205.

328. Presentation by Tracy Gray-Barkan, *supra* note 184.

329. See Cleeland & Vrana, *supra* note 10.

330. Through 2005, Wal-Mart had generally been able to capitalize on consumer support for its discounted prices to win most of the local fights against Superstores, prompting CEO Lee Scott to boast at Wal-Mart's 2005 Annual Shareholders Meeting that the company had won twenty-two out of twenty-seven California ballot contests. See Wal-Mart Watch, *supra* note 205, at 25. For a compilation of local big-box battles, see ADAM CLANTON & KERRY DUFFY, CALIFORNIA RESPONSES TO SUPERCENTER DEVELOPMENT: A SURVEY OF ORDINANCES, CASES AND ELECTIONS, HASTINGS COLLEGE OF LAW PUBLIC LAW RESEARCH INSTITUTE REPORT (Spring 2004).

Council to approve a Supercenter project in 2004. The UFCW went in after City Council approval and without political support was forced to litigate its opposition to Wal-Mart. Though a community-labor coalition successfully challenged the sufficiency of Wal-Mart's Environmental Impact Report in court,³³¹ the city simply revised the EIR to address the impact of the store's twenty-four-hour operations and proceeded to confer ultimate environmental approval. Subsequently, the coalition drafted a referendum to repeal the city's development agreement with Wal-Mart, which opponents believed contained zoning changes necessary for Wal-Mart to open. However, the coalition's legal counsel was poorly advised, as the development agreement contained no such zoning changes; when the city simply rescinded the development agreement in the face of the coalition's challenge, it had the perverse effect of permitting Wal-Mart to accelerate construction on the Supercenter,³³² which opened in September 2006.³³³

However, Wal-Mart has had less success challenging anti-big-box ordinances. This has been due, in part, to the fact that some jurisdictions have followed the Los Angeles model and adopted ordinances that provide for economic impact analyses rather than impose bans—thus rendering them less susceptible to legal challenge or ballot referenda.³³⁴ For example, in March 2006 after Alameda County repealed its original ban in the face of a Wal-Mart lawsuit, it enacted the first-ever county-wide big-box ordinance requiring an economic impact analysis.³³⁵ Wal-Mart suffered a major legal setback in its effort to litigate against big-box bans when it lost a recent challenge to the big-box ban in Turlock, which the California Court of Appeals upheld as a constitutional exercise of the city's police powers that did not require further environmental review under CEQA.³³⁶

The Turlock case has buoyed Wal-Mart's labor opponents, whose post-Inglewood approach has been the mirror image of Wal-Mart's. While

331. *Save Our Community v. Rosemead*, No. BS903012 (Cal.Sup.Ct. April 22, 2005), available at <http://www.lasuperiorcourt.org/civilcasesummary/index.asp>.

332. See Hector Becerra, *Wal-Mart Foes Face Setback in Rosemead; Opponents of a Planned Superstore Find Their Efforts Have Worked in the Discouter's Favor*, L.A. TIMES, Dec. 16, 2004, at A1. The community-labor coalition subsequently tried to vote out pro-Wal-Mart city council members. See Jason Felch, *3 Candidates Hope to Rout Wal-Mart; Challengers in Rosemead's Election on Tuesday Seek to Unseat Incumbents Who Backed the Store's Move into the Community of 53,000*, L.A. TIMES, March 6, 2005, at B1. This campaign, however, also failed. See Jason Felch, *Wal-Mart Foes Claim Win in Rosemead: Voters Oust Two Council Members Who Backed Chain, Which Still Plans to Build a Store There*, L.A. TIMES, Mar. 10, 2005, at B1.

333. See Hector Becerra, *Wal-Mart Wages Fight for Suburbs; As Efforts to Open Its Supercenters in Urban Areas Have Failed, the Retail Giant Finds Success in Rosemead. But Some Local Officials Face Recall*, L.A. TIMES, Sept. 19, 2006, at B1.

334. See Robert Greene, *Thinking Outside the Big Box: L.A.'s New Law to Rein in Wal-Mart Isn't Sweeping, But It May Be Smart*, L.A. WEEKLY, Aug. 13-19, 2004, <http://www.laweekly.com/news/news/thinking-outside-the-big-box/1435/>.

335. See GRAY-BARKAN, *supra* note 7, at 18.

336. *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal.App.4th 273 (2006).

Wal-Mart has retreated from the biggest cities, labor has chosen those sites to expand restrictive big-box ordinances, taking advantage of the Turlock court's legal validation of big-box bans to pass them in San Diego,³³⁷ Santa Ana,³³⁸ and Long Beach.³³⁹ However, Wal-Mart still plans to challenge the bans via referenda. It therefore remains to be seen whether Wal-Mart opponents can build on the Inglewood success to defeat Wal-Mart at the ballot box—or if the Inglewood victory will be confined to the unique facts of Wal-Mart's ill-considered invocation of the ballot initiative process. At this stage, it does appear that the symbolic power of the Inglewood site fight—a story of a small community defeating a retail giant—has fed into new campaigns, which have fought Wal-Mart's small-city approach by trying to beat Wal-Mart at its own game, preempting development approvals at the city-level when possible and filing lawsuits when necessary. In one unique case, smart growth groups in the tiny Bay Area suburb of Hercules persuaded the city to exercise eminent domain to take land owned by Wal-Mart.³⁴⁰ Other community groups have pursued CEQA litigation to block proposed Supercenters,³⁴¹ taking advantage of a 2004 California Court of Appeals decision to argue that the environmental review process should consider economic blight induced by big-box competition in addition to traditional environmental impacts.³⁴² Additional fights in cities like Ventura³⁴³ and Marina³⁴⁴ have contributed to the slowing pace of Wal-Mart's California expansion.³⁴⁵ Five years after the company announced its plans to bring forty Supercenters to California, it has opened only half that amount.³⁴⁶

337. See *Council Votes to Ban Wal-Mart*, L.A. TIMES, Nov. 30, 2006, at B4. The San Diego ban was pushed by the Joint Labor Management Committee. See Penni Crabtree, *Proposed Ordinance in San Diego Takes Aim at Wal-Mart Supercenters*, S.D. UNION-TRIBUNE, Nov. 20, 2003, at C1.

338. See Dave McKibben, *Santa Ana Prepares to Ban Supercenters*, L.A. TIMES, Jan. 18, 2007, at B5.

339. See Nancy Wride, *Big-Box Grocery Ban Is Headed for the Ballot Box in Long Beach*, L.A. TIMES, Jan. 8, 2007, at B3. Currently, Wal-Mart is challenging the big-box ordinance in Long Beach by referendum. See *id.*

340. See Chris Thompson, *Hercules vs. Wal-Mart*, EAST BAY EXPRESS, Dec. 20, 2006, available at <http://eastbayexpress.com/2006-12-20/news/hercules-vs-wal-mart>.

341. See, e.g., *Save Our Gateway v. Town of Paradise*, 2007 WL 106189 (Cal. App. 3d Dist. Jan. 17, 2007).

342. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184, 1207 (2004).

343. See Fred Alvarez, *No Big Boxes in Store for Ventura Group*, L.A. TIMES, Sept. 15, 2005, at B1.

344. See *Citizens Against Wal-Mart* in Marina, Local Information, at <http://www.nowalmartinmarina.org/local-information.htm> (last visited July 2, 2007).

345. See Emili Vesilind, *Wal-Mart Foes Try to Slow California Growth*, WOMEN'S WEAR DAILY, Sept. 20, 2006, at 14; see also Marcus Kabel, *Wal-Mart to Slow Pace of Store Openings*, washingtonpost.com, Oct. 23, 2006, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102300332.html>.

346. See *Wal-Mart Facts, California Community Impact*, at <http://www.walmartfacts.com/StateByState/?id=5> (last visited July 2, 2007).

III. LAW IN THE ANTI-WAL-MART MOVEMENT: LESSONS FROM LOS ANGELES

As the Inglewood case study demonstrates, the anti-Wal-Mart labor movement has emerged as a fluid network of community and labor groups that seek to raise the standards of low-wage workers outside of conventional labor law processes.³⁴⁷ As such, it represents an important part of “next-wave” labor activism that has presented new opportunities for lawyers to ally themselves with a large-scale movement seeking economic redistribution.³⁴⁸ Drawing on the lessons of the Inglewood campaign, this Part examines how the emergence of powerful community-labor coalitions that coordinate to advance economic reform has both relied upon and reshaped legal activism. It first analyzes the design and implementation of the big-box law reform campaign as a coordinated legislative effort targeting local government. It then assesses the lawyers’ role in the Inglewood site fight, focusing attention on how the deployment of multifaceted legal tactics and the coordination of legal experts from different practice sites contributed to the campaign’s goals while simultaneously raising complex issues of client and community accountability.

A. Multi-Level Legal Advocacy

The classical model of law reform emphasized the creation of *universal rules* codified at the *federal level*.³⁴⁹ This model—symbolized by the civil-rights era campaign of the NAACP LDF, culminating in *Brown v. Board of Education*, and the subsequent enactment of federal civil rights laws³⁵⁰—was egalitarian in its application and top-down in its implementation. This model was driven in part by the unique political terrain of the times. During the civil rights era, because there were few effective routes of political redress at the state and local levels for African Americans, advocates focused resistance efforts at the more politically liberal centers of federal power, particularly the federal judicial branch, which held out the promise of protecting minority rights.³⁵¹ A similar dynamic occurred during the New Deal period, when organized labor invoked federal governmental power to facilitate organizing and counteract the economic influence of industrial capital.

347. For a broader historical perspective on the anti-chain store movement, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005).

348. Cf. Narro, *supra* note 21.

349. See Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law”*, 2005 WIS. L. REV. 455.

350. See Lobel, *supra* note 16, at 946.

351. See Owen Fiss, *A Life Twice Lived*, 100 YALE L.J. 1117 (1991).

The dominant scholarly perspective is critical of top-down, universal law reform on three basic grounds. First, scholars have been generally dubious of the long-term effectiveness of top-down rules, which operate too far from the ground level to be effectively enforced.³⁵² Second, scholars have objected to the pursuit of rights as a goal of transformative advocacy,³⁵³ arguing that they are too inflexible to allow for the sort of bargaining necessity to resolve complicated social problems and too individualistic to sustain ongoing collective action.³⁵⁴ Third, scholars have questioned the absolute benefits of laws of universal application, which can obscure local differences and inhibit local experimentation.³⁵⁵ The Inglewood case study provides a vantage point for examining each of these critiques.

1. *The Location of Law Reform: Bottom-Up*

Within the legal scholarship, local advocacy has been viewed as one potential response to some of the weaknesses of top-down law reform. This scholarship has offered examples of client empowerment,³⁵⁶ community economic development,³⁵⁷ and immigrant worker organizing³⁵⁸ as grassroots alternatives to traditional public interest litigation. One critique of these approaches has been to note the absence of any strong linkage between local advocacy and transformative political or economic reforms.³⁵⁹ The Inglewood case study, in contrast, offers an example of local advocacy in the service of broader redistributive goals that is firmly linked to the labor movement's campaign to codify laws that benefit the working poor. In particular, the successful site fight unfolded as part of a larger policy initiative led by the UFCW and LAANE to protect unionized grocery jobs that culminated in the Los Angeles and Inglewood big-box

352. See HANDLER, *supra* note 16, at 18 (referring to the difficulties of administrative agency enforcement of rules as the "bureaucratic contingency"); ROSENBERG, *supra* note 16, at 338 (concluding that courts could "almost never be effective producers of significant social reform" because of their dependence on other political institutions and their lack of enforcement powers).

353. See Scheingold, *supra* note 16.

354. See Simon, *supra* note 20, at 147-57.

355. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUMIA L. REV. 267 (1998).

356. See GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 101 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

357. Cummings, *supra* note 15.

358. The pioneering work is by Jennifer Gordon, see GORDON, *supra* note 21, which has been built upon by a number of scholars who have illuminated the relationship between legal advocacy and immigrant organizing. See Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1829 (2007); Narro, *supra* note 21, at 471-95; see also Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 ASIAN L.J. 67 (2005).

359. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 484-88 (2001).

ordinances requiring Wal-Mart to submit an economic impact report to gain Supercenter approval. The site fight strategy thus deployed both legal and organizing techniques to gain passage of local policy reform. In this sense, the Inglewood campaign resonated with the law reform orientation of classical public interest law efforts, but instead of pursuing law reform in a “top-down” fashion through courts, the Inglewood campaign revealed how lawyers deploy legal advocacy as a complement to grassroots activism to enact law reform from the “bottom-up” through local legislative channels. This strategy, to be sure, reflected the distinct political opportunity structure facing the anti-Wal-Mart activists, who could not count on the federal government as a source of legal protection and regulation for progressive causes.³⁶⁰ Yet the Superstores Ordinance may also be understood as responding to some of the criticisms of court-based law reform efforts, in that it erects a structure for regulating big-box stores that can be monitored and enforced by local labor activists close to the action. The ordinance thus requires ongoing mobilization efforts in order to be an effective check on Wal-Mart’s development plans,³⁶¹ and is thus consistent with labor’s broader goal of promoting laws that promise to reinforce organizing.³⁶²

2. *The Nature of Law Reform: Hard Versus Soft*

The Superstores Ordinance can be viewed as an example of “soft” law that instead of imposing strict regulatory standards on Wal-Mart or barring it outright, sets up a framework for assessing economic impacts as a starting point for discussions about how to maximize the benefits of big-box retail while minimizing its costs.³⁶³ As such, the ordinance requires that Wal-Mart opponents gather evidence demonstrating the costs of big-box retail on particular communities and offer proposals to mitigate such costs. This means that community groups will have to monitor proposed developments and provide rigorous empirical documentation of potential impacts. This process is unlikely to completely block a big-box project because the ordinance permits project approval so long as any adverse material impacts are mitigated (though Wal-Mart may opt not to incur the cost of compliance). Nevertheless, the system requires bargaining between Wal-Mart and labor and community stakeholders over the terms of entry.

One outcome of this bargaining could be a community benefits agreement, like the ones LAANE has entered into with publicly subsidized

360. See Michael McCann & Jeffrey Dudas, *Retrenchment...and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 14.

361. Cf. Simon, *supra* note 20, at 175-77.

362. Telephone Interview with Margo Feinberg, *supra* note 145.

363. However, to the extent that the ordinance operates to keep Wal-Mart out altogether, the distinction may be of little practical use.

private developers,³⁶⁴ which would include private contractual provisions mandating specific mitigation efforts by Wal-Mart. For instance, one possible resolution of a community challenge to the sufficiency of a Wal-Mart economic impact analysis on the grounds of a Supercenter's negative impact on labor standards might be a community benefits agreement requiring Wal-Mart to pay living wage and a baseline threshold of health benefits in order to gain city approval. It is also plausible that such requirements would be memorialized in any development agreement between the city and Wal-Mart.

The emphasis on stakeholder negotiation and the reliance on community participation to press for higher labor standards at Wal-Mart raises its own questions about the ultimate political effectiveness of information-forcing soft laws like the Superstores Ordinance. LAANE justified its support of the ordinance on the ground that it would avoid unnecessary litigation over its terms and so far this has held true. Yet is it not clear that the ordinance achieves the political goal of enhancing labor rights more effectively than either a complete ban, which has now survived legal challenge in Turlock, or a law tying big-box approval directly to living wage requirements, as has been tried in Chicago. LAANE's position is that the economic impact approach is still superior to these other alternatives, which are politically riskier since they are more likely to invite costly challenges and do not necessarily provide better outcomes for workers given that the Superstores Ordinance will either deter Wal-Mart entry (and thus operate like a complete ban) or result in bargained-for labor improvements (and thus operate like a living wage requirement). Moreover, it is not self-evident that workers in every case are necessarily better off without Wal-Mart and thus the Superstores Ordinance allows for the possibility of a win-win situation with Wal-Mart allowed to provide low-cost goods and increase jobs in a specific community, but on terms that are acceptable to a wide range of labor and community actors.

However, if the community benefits agreement movement is any guide, should Wal-Mart eventually decide to test the economic impact analysis process in Los Angeles or Inglewood, its strong bargaining power may allow it to negotiate a relatively lenient set of obligations in exchange for community support.³⁶⁵ For instance, in the community benefits agreement LAANE negotiated in 2001 with the developers of the Staples Center, there were no hard sanctions for failure to comply with living wage and first source hiring benchmarks, while the developer was relieved of the direct obligation to fund certain aspects of the benefits program, such as the requirement to provide park space and affordable housing, which could be financed by philanthropic sources under the terms of the deal.³⁶⁶

364. See GROSS ET AL., *supra* note 128.

365. See Cummings, *supra* note 14, at 329.

366. See *id.*, at 328-29.

Nonetheless, one major advantage of the Superstores Ordinance is that it provides a politically legitimate mechanism for imposing stricter standards on Wal-Mart, which distinguishes it from the ad hoc community benefits agreement approach that relies on leveraging legal mechanisms—like environmental review—that are not designed to facilitate bargaining over economic issues. In this sense, the ordinance provides a stronger legal framework within which to advocate revisions to Wal-Mart economic policies. As a formalistic matter, the economic impact analysis process envisioned under the ordinance will ultimately come down to the city's evaluation of competing impact reports—with Wal-Mart consultants touting the community benefits of a Supercenter and labor consultants criticizing the harms. How these reports are interpreted by city decision makers and what mitigation requirements are ultimately imposed on Wal-Mart will be a function of political wrangling that will put labor's political strength to the test. From a regulatory perspective, the effectiveness of the economic impact analysis process in placing constraints on Supercenter development will thus be contingent on organized labor's ability to sustain political power and mobilize on a case-by-case basis.

3. The Application of Law Reform: Strategies of Diffusion

By focusing on enacting Superstores Ordinances in Inglewood and Los Angeles, labor activists were able to calibrate strategy based on local political dynamics and adapt policies to local conditions. This approach feeds into a broader effort, which involves constructing a set of local policies that force Wal-Mart to seek broad public approval for its economic impacts and diffusing the policies on a city-by-city basis in order to establish wide geographic areas where big-box development must be accountable to community and labor stakeholders. The main issue raised by this bottom-up approach is the capacity to replicate and extend victories without a central means of coordination and given the distinct political dynamics presented by different cities. After Inglewood, a range of formal and informal mechanisms have developed to draw attention to big-box mobilizations across the country and foster greater coordination.³⁶⁷

On the legal front, lawyers active in the Inglewood campaign have developed expertise that has positioned them as valuable resources for national groups. Margo Feinberg, in particular, has served as a key node of information exchange, giving free advice to community-labor groups around the country who call about drafting big-box ordinances.³⁶⁸ On the national level, the Brennan Center for Justice, a public interest law organization in New York that has been instrumental in the national living

367. See Steven Greenhouse, *Opponents of Wal-Mart to Coordinate Efforts*, N.Y. TIMES, Apr. 3, 2005, at A20.

368. Telephone Interview with Margo Feinberg, *supra* note 145.

wage movement,³⁶⁹ has developed relationships with community-labor groups promoting big-box reforms, lending crucial legal support in drafting ordinances and defending them from legal attack.³⁷⁰

Local and national labor groups have played a critical role in devising ordinances and deliberately exporting them to new locations. LAANE, in particular, has become a key actor in promoting and coordinating anti-Wal-Mart campaigns, recently producing a resource guide that distills the collective experience of community-labor groups around the country and outlines legal and organizing responses to Wal-Mart development.³⁷¹ The Partnership for Working Families is now supporting big-box activism in fifteen cities and is seeking to hire more staff and double the number of cities with active Wal-Mart campaigns.³⁷² The goal of these efforts is to both enact local policies and also change the nature of the dialogue about the role of local governments to promote labor standards. Indeed, the success of LAANE and other community-labor groups in winning living wage and big-box ordinances has helped to revise expectations about how local governments should use their power to link economic development to social justice.³⁷³

The unions themselves have been active participants in the strategic diffusion of Wal-Mart reforms. UFCW-backed Wakeupwalmart.com and SEIU-sponsored Walmartwatch.com have created sophisticated websites that provide information about ongoing site fights and legislative proposals, while offering communities step-by-step guides to resist Wal-Mart developments. At the state level, labor groups have launched efforts to pass “fair share” laws to force Wal-Mart to increase health care benefits for employees or pay into a state health care fund, though these have stalled after Wal-Mart successfully challenged the Maryland Fair Share Health Care Fund Act on the ground that it was preempted by the federal employee benefits law.³⁷⁴ Yet the Maryland case only serves to underscore the high-stakes political and legal activism that has enveloped Wal-Mart development in the post-Inglewood period. While labor and community

369. See Brennan Center for Justice at NYU School of Law, Living Wage Project Description, available at www.brennancenter.org/programs/living_wage/index.html.

370. See Brennan Center for Justice at NYU School of Law, Job Standards and Accountability for Large Retailers, available at http://www.brennancenter.org/subpage.asp?key=413&tier3_key=8492.

371. See GRAY-BARKAN, *supra* note 7. The Advancement Project, a national social justice organization, has also sought to promote anti-Wal-Mart activism through developing and disseminating a case study on Inglewood. See Elliot Petty, *The People vs. Wal-Mart: Strategies that Work*, ADVANCEMENT PROJECT, NL VOLUME 12 CASE STUDIES, July 15, 2005.

372. The selection of target cities is based on established criteria, including the presence of a strong labor board, receptive local governmental officials, and significant communities of color, which are viewed as the frontier of new labor organizing campaigns.

373. Telephone Interview with Margo Feinberg, *supra* note 145.

374. FAIR SHARE HEALTH CARE FUND ACT, MD. CODE ANN., LAB. & EMPL. §8.5-101 (Michie's Supp. 2006). *Retail Indus. Leaders Assoc. v. Fielder*, 435 F. Supp. 2d 481 (D. Md. 2006) (holding Act preempted by ERISA); see also Edward A. Zelinsky, *Maryland's "Wal-Mart" Act: Policy and Preemption*, 28 CARDozo L. REV. 847 (2006).

groups have certainly not been able to stop Wal-Mart Supercenter development, they have been able to place some limits on its pace, scope, and density.

B. *Tactical Pragmatism*

In contrast to the conventional focus on litigation as the public interest lawyer's primary tool, the Inglewood case also shows lawyers operating with a significant degree of tactical flexibility in connection with grassroots labor rights campaigns. Indeed, the Inglewood campaign, culminating in the ballot-box defeat of Wal-Mart and the subsequent passage of a Superstores Ordinance, required the lawyers involved to engage in a range of traditional (litigation) and non-traditional (organizing, lobbying, and publicity) advocacy tactics to achieve labor's goals. In this sense, the Inglewood case illustrates legal advocacy that is problem-solving rather than litigation-focused.³⁷⁵ Litigation still plays an important role in advancing the larger labor campaign, as the legal challenge to Measure 04-A underscored, yet it is deployed as part of a broader repertoire of advocacy techniques that lawyers bring to bear to resolve political and economic disputes. Thus, the Inglewood lawyers used traditional litigation strategies in an attempt to gain concrete "wins" and to spur ongoing mobilization, while also readily incorporating non-traditional techniques to advance policy goals.

1. *Traditional Advocacy in the Service of Mobilization*

The critique of public interest litigation emphasizes its potential to undermine political action by draining scarce movement resources, creating confusion between "symbolic" and "substantive" victories,³⁷⁶ co-opting potential movement leaders by paying them off with monetary awards,³⁷⁷ and translating collective grievances into individual rights claims that "undermine collectivities"³⁷⁸ and legitimate inequities inscribed in the legal status quo.³⁷⁹ The Inglewood case study provides an example of lawyers and activists using law in sophisticated ways to advance a well-defined labor rights campaign that is in tension with this critical view. In the Inglewood campaign, law was deployed as one type of political resource used to advance strategic ends: a legal challenge was undertaken, but only in the context of a broader political strategy in which activists viewed the lawsuit as complementing their get-out-the-vote drive.

375. See Simon, *supra* note 20.

376. See ROSENBERG, *supra* note 16.

377. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 438-39 (1995).

378. Richard L. Abel, *Lawyers and the Power to Change*, 7 L. & POL'Y 5, 8-9 (1985).

379. See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-1983).

Litigation was an important part of the overall site fight campaign, but it was used for purposes distinct from the traditional law reform suit, insofar as one important goal was to have a public relations and organizing impact, rather than gain a definitive adjudication of rights. Specifically, the lawsuit was brought to undermine the ordinance's legal legitimacy in the public eye in order to persuade Inglewood voters to oppose Measure 04-A at the ballot box. In this sense, the use of litigation in the Inglewood campaign was politically pragmatic—not viewed as an end in itself, but rather as a way to enhance and supplement movement activity.³⁸⁰

In addition, the role of lawyers in helping the UFCW and LAANE to understand and intervene in the local land use planning process was critical to labor's push for big-box reform—and highlights another way in which lawyering can facilitate community mobilization. While the use of litigation as a spur to mobilization has received a great deal of scholarly attention,³⁸¹ there has been less focus on the relationship between law and mobilization outside the litigation context. The community economic development model provides one example of how lawyers use a non-litigation approach to support low-income community mobilization efforts. In this model, communities organize themselves as nonprofit developers in order to leverage outside public and private investment to build affordable housing and commercial projects.³⁸² To facilitate these projects, lawyers adopt a transactional approach, counseling groups on creating legal associations that permit access to government incentive programs and promote community participation in executing development deals.³⁸³ In the site fight context, the model of community mobilization is distinct—and, accordingly, so is the advice that lawyers render. When mobilizing against big-box development, community groups organize themselves into coalitions to make political demands on local governments to either block Wal-Mart or condition its development on the promise of benefits for low-income communities. To do this, coalitions take advantage of the legal rights to participate in local political decision making, particularly those embedded in the land use and environmental review process, which permit public input in the city process of Supercenter approval. In this process, lawyers assist the coalitions to identify and navigate routes of legal

380. In this sense, the use of law in Inglewood conforms to that described by Michael McCann and Helena Silverstein in their analysis of the pay equity and animal rights movements, in which they found that lawyers "did not view litigation as an exclusive end in itself" but instead were "very committed to encouraging, enhancing, and supplementing" movement activity. See Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 269 (Austin Sarat & Stuart Scheingold eds., 1998).

381. See *id.*; see also HANDLER, *supra* note 16, at 209-22; MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 278-310 (1994).

382. See Cummings, *supra* note 15, at 438-41.

383. See Cummings, *supra* note 14, at 326.

participation, through which they can exercise their rights to advocate against land use and environmental clearance. The leverage afforded by these participation rights is the threat of disruption, which can be actualized by pressuring decision makers to deny public approval or suing to block developments on the basis of faulty public procedures.

In Inglewood, legal knowledge of the land use process was key to the coalition's campaign against Walmart. First, LAANE's experience working with David Pettit and other lawyers to negotiate community benefits agreements equipped it with a deep understanding of how crucial land use approvals could be as leverage points in negotiations over development conditions. Accordingly, at the outset of the Inglewood campaign, the coalition focused on amending land use laws to ban big-box development as a way of derailing the proposed Supercenter development. Second, when Wal-Mart placed Measure 04-A on the ballot, Jan Chatten-Brown advised coalition members that the initiative constituted a circumvention of their public participation rights. The legal and organizing efforts that followed emphasized the deprivation of public input as both a legal violation and a political power grab. Finally, with Margo Feinberg's assistance, the coalition revised the land use approval process in the Superstores Ordinance to make a Superstore conditional use permit contingent on a favorable economic impact finding. Thus, the community-labor coalition was able to use knowledge of the land use legal system to strengthen community participation rights in the context of Wal-Mart development. Legal expertise on land use issues continues to be critical to labor's Wal-Mart agenda going forward, as is evident in the many efforts to block Supercenter land use approvals and amend local land use laws to limit big-box development. In this way, labor has used the opportunities for participation afforded by land use law to advance a labor rights agenda at the local level.

Indeed, the Inglewood campaign and the enactment of big-box ordinances have bolstered the Los Angeles labor movement in important ways. In particular, the absence of a Supercenter has framed the current negotiations over renewed labor contracts in the grocery sector, which has benefited from the protection against Wal-Mart that the Superstores Ordinances have afforded.³⁸⁴ The UFCW has sought to use its success against Wal-Mart to reverse the two-tier wage and benefit system imposed after the 2004 strike: it recently agreed with regional chain Stater Bros. to eliminate two-tier benefits,³⁸⁵ and called a strike against Albertsons as part of its strategy to negotiate individually with grocery chains to force the

384. See Abigail Goldman, *Grocers Lose Their Wal-Mart Leverage*, L.A. TIMES, April 12, 2007, at C1.

385. See Jerry Hirsch, *Stater May End Two-Tier Pay*, L.A. TIMES, Jan. 13, 2007, at C1.

rescission of the two-tier system.³⁸⁶ At the grassroots level, LAANE has supported an initiative to raise standards in the grocery industry by organizing the Los Angeles Grocery Worker and Community Health Coalition, which has sponsored a review of the grocery industry that calls for the provision of health care benefits for grocery workers, the elimination of the two-tier wage and benefits system, city incentives for groceries with good labor records, and the creation of city policy to prevent grocery stores from redlining low-income communities.³⁸⁷

2. Nontraditional Advocacy in the Service of Legal Reform

To the extent that the Wal-Mart campaign centered on reforming city policy to demand higher standards from Wal-Mart, it invoked an alternative set of advocacy skills focused on drafting ordinances, coordinating public relations, and mobilizing grassroots support. Margo Feinberg, in particular, was closely involved in drafting the economic impact ordinance, both in Los Angeles and Inglewood, and contributed to the lobbying efforts to secure its passage. In addition, she performed a number of other useful campaign tasks, such as negotiating with City Council members over the ordinances' terms, coordinating the Inglewood legal team in preparation for its potential challenge to Measure 04-A, and helping to support the Inglewood public relations campaign by enlisting legal opinions from high-profile lawyers like the California Attorney General. The UFCW's John Grant also contributed important nontraditional skills, including preparing community members to testify at government hearings and helping to orchestrate the union's get-out-the-vote drive. Madeline Janis, LAANE's director, helped to plan and implement other aspects of the comprehensive campaign, including designing grassroots strategy, fundraising for the legal and organizing efforts, and providing input on the structure of the Superstores Ordinances.

C. Networked Expertise

The Inglewood case was also notable for its use of a networked team of multiple lawyers to advance its anti-big-box strategy. Though Jan Chatten-Brown was counsel of record in the litigation against Measure 04-A, the campaign was also supported by the ordinance drafting of Margo Feinberg, the policy expertise of the UFCW's John Grant, and the land use and environmental legal support provided by David Pettit and Sean Hecht as members of the legal team assembled to litigate against Measure 04-A if it passed. Two features of this arrangement are highlighted here.

386. See Jerry Hirsch, *A Change in Strategy; Scarred by a Long Grocery Work Stoppage in 2003-04, Union Leaders Plan this Time Around to Negotiate with One Supermarket Chain at a Time*, L.A. TIMES, Sept. 24, 2006, at C1; Jeremy Hirsh, *Union to Seek Strike Vote from Albertsons Workers*, L.A. TIMES, Mar. 21, 2007, at C3.

387. See INDUSTRY AT A CROSSROADS, *supra* note 6, at 7.

1. Practice Sites

First, unlike the paradigmatic public interest law case brought by staff lawyers working in a nonprofit organization, the professional locations of the lawyers involved in Inglewood were private law firms and law schools. This configuration was driven in part by the pursuit of relevant expertise. Labor lawyers are located primarily in private firms that serve as outside counsel on a fee-for-service basis to local unions; thus, to the degree that labor law expertise in the retail sector was needed, Feinberg's law firm was a logical choice. In addition, because land use planning and election law are not topics strongly associated with public interest law groups, LAANE was forced to venture outside the nonprofit community to find lawyers with the right skills to litigate the ballot initiative. Though traditional environmental law groups might have been able to contribute the relevant legal expertise, the politically sensitive nature of the case (challenging a Wal-Mart on community impact grounds) and the need to invest a relatively large amount of legal resources within a small time frame cut against their involvement. Further, because the campaign targeted a major corporation it was outside the ambit of big-firm pro bono, which generally avoids legal challenges to corporate clients.³⁸⁸ Accordingly, LAANE settled on a fee-for-service arrangement with a small public interest firm, Chatten-Brown & Associates, willing to take on the case for less than market rates because of its political mission and personal ties to the activists involved in the campaign. LAANE did receive pro bono counsel from Pettit, but his location as a partner in a boutique litigation firm with a liberal political orientation gave him greater flexibility in dictating the nature of his pro bono representation. The other members of the legal team, Hecht and Erwin Chemerinsky, were enlisted both because of their relative expertise and because it was thought that they would lend academic legitimacy to the site fight.

2. Professional Interdisciplinarity and Interlocking Motivation

The second noteworthy feature of the legal team was its interdisciplinary character. Though Inglewood was, at bottom, a labor rights campaign, its focus on leveraging labor reform through local land use planning, coupled with the unique nature of Wal-Mart's invocation of the initiative process, meant that land use and environmental lawyers were enlisted in the service of labor movement objectives. Thus, labor's local strategy drove the UFCW and LAANE to cast their search for legal assistance broadly, blurring the lines between traditional labor law on the one hand, and land use and environmental law on the other—fields that have often been at odds over the trade-off between promoting job-producing development versus preserving the environment. In this sense,

388. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

Wal-Mart gave labor and environmental activists a way of forging a concrete, if still fragile, alliance.

The interdisciplinary nature of the legal team was also reflected in the differential motivations that brought each lawyer to the campaign. Though all of the lawyers involved contributed to the ultimate union-defined goal of blocking Wal-Mart to advance labor standards, it is worth emphasizing that the lawyers each approached the engagement with unique notions of the “cause.”³⁸⁹ Feinberg and Grant, as labor lawyers, obviously pursued the Wal-Mart case from the standpoint of promoting labor movement goals. However, the other lawyers viewed their involvement through slightly different lenses. For Chatten-Brown, though her firm was on retainer, financial gain was not the prime motivator, given that she was charging LAANE and CBI a reduced rate. Instead, she accepted the Inglewood case as a way of challenging what she viewed as an instance of bad land use planning on behalf of a company that she held in low regard from an environmental perspective.³⁹⁰ For Pettit, the land use attorney, the cause was framed in terms of promoting community participation through the framework of land use planning.³⁹¹

Similarly, for Sean Hecht, the UCLA environmental law professor also on the legal team, the incentive to get involved was partly personal and partly political. On the one hand, he viewed Inglewood as a compelling case at the intersection of three fields of personal interest: constitutional, land use, and election law.³⁹² In addition, as a practicing lawyer who had recently moved into an academic setting, he was motivated by the opportunity of reconnecting with the “real world” of practice, particular in the context of what he viewed as a potential “test case” for land use and environmental law in California.³⁹³ Yet he also got involved based on his policy preferences. In particular, as an environmental lawyer, Hecht felt passionately about the integrity of responsible land use planning as a feature of good governance and believed that it was wrong for Wal-Mart to try to subvert CEQA through initiative, thus carving a huge loophole through the legal framework of environmental review.³⁹⁴ In this sense, he wanted to help keep Wal-Mart out of Inglewood as a way to promote sound environmental policy.

While the motivations of the lawyers in the Inglewood case coalesced around the goal of supporting the site fight, it is interesting to consider how

389. See AUSTIN SARAT & STUART SCHEINGOLD, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3 (2004) (“At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic or, indeed, legal.”).

390. Telephone Interview with Jan Chatten-Brown, *supra* note 254.

391. Telephone Interview with David Pettit, *supra* note 258.

392. Interview with Sean Hecht, *supra* note 261.

393. *Id.*

394. *Id.*

the lawyers' distinct conceptions of the cause might affect future efforts to assemble coalitions. Indeed, while Wal-Mart attempts to placate workers in a way that reduces the appeal of unionization,³⁹⁵ it also works to wedge off different factions of the fluid anti-Wal-Mart coalition. Its grant-making to African American civil rights organizations is well-known, but Wal-Mart has also sought to direct its public relations campaign toward mollifying other critics.³⁹⁶ For instance, Wal-Mart has recently announced an initiative to build environmentally friendly "green" stores,³⁹⁷ while also providing grants and technical support to small businesses threatened by the Supercenter format.³⁹⁸ To the degree that these efforts to cleave off potential anti-big-box coalition members gain prominence, they may ultimately influence the motivations of environmental and land use attorneys currently aligned with the labor movement, who may avoid future advocacy against Wal-Mart on the ground that the company is making strides toward environmental sustainability and smart growth.

D. Multi-Tier Accountability

The multiplicity of roles played by the lawyers on the anti-Wal-Mart legal team combined with the fluid nature of the activist coalition to raise unique issues of accountability—both the lawyers' accountability to the clients and the clients' accountability to the broader community.

1. Lawyer-Client

One concern that has preoccupied scholars of public interest practice has been the degree to which sophisticated and socially privileged lawyers use their professional power to negate the efficacy of less powerful clients.³⁹⁹ Disempowerment may occur when overbearing lawyers purport to "know what is best" and thereby exclude clients from meaningful participation in the process of formulating responses to their own grievances.⁴⁰⁰ Alternatively, client disempowerment may occur when well-meaning lawyers fail to exploit moments of client resistance, unwittingly reinforcing stereotypes of client passivity—infected by race and gender

395. See Michael Barbaro, *Wal-Mart to Expand Health Plan for Workers*, N.Y. TIMES, Oct. 24, 2005, at C1; Michael Barbaro & Steven Greenhouse, *Wal-Mart Says Thank You to Workers*, N.Y. TIMES, Dec. 4, 2006, at C1.

396. See Michael Barbaro, *A New Weapon for Wal-Mart: A War Room*, N.Y. TIMES, Nov. 1, 2005, at A1; Michael Barbaro, *Wal-Mart Enlists Bloggers in Its P.R. Campaign*, N.Y. TIMES, Mar. 7, 2006, at C1.

397. See Abigail Goldman, *Wal-Mart Goes 'Green'*, L.A. TIMES, Nov. 13, 2006, at C1.

398. See Michael Barbaro, *Wal-Mart to Offer Help Near Urban Stores*, N.Y. TIMES, April 4, 2006, at C1.

399. See LÓPEZ, *supra* note 356; Alfieri, *supra* note 356; White, *Subordination*, *supra* note 356. For a version of this critique in the context of civil rights practice, see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

400. See LÓPEZ, *supra* note 356, at 14.

bias—that operate to further marginalize clients as agents of social change.⁴⁰¹

One antidote to disempowerment is expressed in terms of commitment to a client-centered process of legal representation, in which the end goal is not simply legal victory measured in conventional terms (though this is not unimportant), but the promotion of a sense of personal agency on the part of clients. This emphasis on process suggests not just that lawyers should be attuned to client goals and emotional needs in the conduct of a case,⁴⁰² but also that they should engage in more nontraditional activities, such as organizing informational workshops or convening client support groups,⁴⁰³ in order to transform the lawyer-client relationship into an opportunity to educate clients about the possibilities of resisting subordination.

Underlying this attention to process is thus a commitment to collective action. However, the thrust of the lawyering literature suggests a version of collective action in which a collective consciousness forms organically among community members, who must transform themselves from passive victims of structural injustice into agents of social change. Lawyers can play a role in this transformation, but it is carefully circumscribed: lawyers may use traditional legal tactics to gain conventional victories, but higher-order lawyering for social change is a matter of helping clients to see the commonality of their condition and pointing the direction for meaningful social redress.⁴⁰⁴ Implicit in this conception of social change is a notion of relatively weak and disaggregated community members, who must find their own voice in order to remedy the unjust conditions in which they reside. Also implicit is a strong skepticism of legal efficacy: that is, lawyers are viewed as instrumentally helpful, but law itself is viewed as an ultimately ineffectual tool for achieving meaningful, long-term reforms. Thus, part of the concern about lawyer domination is that the domination will take the form of lawyers pushing clients into the legal channels with which the lawyers are most familiar, thereby leading clients into a social change cul-de-sac bounded by the constraints of legalism.

In the Inglewood context, the nature of the client group and the approach of the lawyers diminished these concerns about the disempowering impact of legal expertise on client mobilization. On the client end, LAANE, in particular, was a relatively powerful community organization, drawing political clout and resources from its labor affiliation, and governed by politically savvy and influential leaders. For

401. See White, *supra* note 356.

402. See BINDER ET AL., *supra* note 22.

403. See *Ingrid V. Eagly, Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998).

404. See Lucie E. White, *To Learn and To Teach: Lessons from Driefonten on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988).

instance, LAANE's executive director, Madeline Janis, was an attorney with significant litigation and policy experience. She was also a member of the Los Angeles Community Redevelopment Agency board and had strong connections to local political officials. The strength and coherence of LAANE's leadership structure tended to insulate it from undue influence from outside lawyers; moreover, LAANE operated as a sophisticated consumer of legal services, selecting outside counsel based on how well they advanced LAANE's objectives. In making this selection, LAANE representatives sought out the best technical lawyers for the specific legal tasks, which meant that they evaluated outside counsel based on conventional metrics of legal expertise and capacity—they did not look for lawyers to undertake organizing functions, which they viewed as appropriately kept within LAANE's purview. In this way, the existence of a strong community organization reduced the risk of lawyer domination. Because LAANE approached the lawyers as empowered political actors, the lawyering itself focused on achieving a political result defined by the coalition rather than on promoting goals envisioned by the lawyers.

For their part, the lawyers who worked on the campaign approached their engagement with LAANE and CBI from a perspective that mitigated concerns about client autonomy. For one, they were generally "private" sector lawyers retained by the clients to achieve a well-specified result. Their role conception, informed by their position in the market, was quite conventional, emphasizing the importance of client-centeredness in representation. The Chatten-Brown & Associates lawyers were specifically brought into the case because of their legal expertise in challenging the ballot initiative, rather than because of their ideological allegiance to the Wal-Mart labor movement. From this perspective, the lawyer-client relationship looked to some degree like a conventional outside counsel arrangement, in which a law firm is retained to assist an organizational client with a discrete objective (the mirror image, indeed, of the relationship between Wal-Mart and its outside law firm). In addition, the cross-cutting nature of the representation—in which environmental and land use lawyers were enlisted to advance a labor organizing campaign—operated to dampen concerns about lawyers placing "cause" above client interests.⁴⁰⁵

David Pettit, the small firm lawyer retained specifically by LAANE to be part of the legal team, explicitly adopted what he termed the "David Binder method" of client representation,⁴⁰⁶ referring to his UCLA Law School professor and one of the founders of clinical legal education—famous for his seminal text in client counseling that advocates a "client-

405. See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING, *supra* note 380, at 3; cf. William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 30 (1978).

406. Telephone Interview with David Pettit, *supra* note 258.

centered” approach emphasizing the need to protect client autonomy in all aspects of representation.⁴⁰⁷ Thus, Pettit approached his ongoing relationship with LAANE from a very deferential counseling perspective, talking to them about their short- and long-term objectives and basing his approach in any particular campaign on LAANE’s clear articulation of its goals—paying close attention to whether LAANE was trying to develop a long-term relationship with city officials in which less adversarial tactics would be appropriate or if the case was a one-shot deal where litigation would be more effective.⁴⁰⁸ Feinberg approached her role as coalition lawyer from a similar perspective. Particularly when it came to drafting the Superstore Ordinances, she listened to what coalition members emphasized as their policy interests and then would produce multiple drafts based on their input, leaving it to the members to provide feedback for additional changes and to accept the version they believed best served their ultimate purposes.⁴⁰⁹

The conventional nature of the lawyer-client relationship nonetheless raised its own accountability questions. Even within the confines of the lawyer-client relationship as constructed by the parties, the potential for conflicts was ripe.⁴¹⁰ First, there were complexities involved in representing both a multi-organizational coalition (CBI) and the lead organizing group (LAANE) within the same case. Group representation raises difficult questions about who speaks for the group,⁴¹¹ but here those questions were exacerbated to the degree that CBI itself was an amalgam of several groups that operated with a range of organizational formality and endowed with very different resources. Thus, on the one hand, CBI was composed of representatives from LAANE and the UFCW, who brought critical financial and organizational resources; on the other, CBI contained more loosely constituted resident and faith-based groups that lent credibility and authenticity, but did not have the same decision-making clout. This created inherent questions of governance and authority to make decisions on behalf of the entire coalition—made more difficult by the fact that LAANE was also named as a separate party to the litigation and was paying for the legal representation.⁴¹² Thus, during the course of the lawsuit, the Chatten-Brown & Associates lawyers coordinated primarily with LAANE representatives—Madeline Janis at the beginning and then primarily Lizette Hernandez and Tracy Gray-Barkan—as the

407. See BINDER, *supra* note 22.

408. Telephone Interview with David Pettit, *supra* note 258.

409. Telephone Interview with Margo Feinberg, *supra* note 145.

410. See MODEL RULE OF PROF’L CONDUCT R. 1.7 (2002).

411. See Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103 (1992).

412. LAANE paid \$100,000 for Chatten-Brown’s services by raising \$85,000 from small donors and some unions through an Internet campaign, and taking \$15,000 from its general operating funds.

spokespersons for the broader group.⁴¹³ This arrangement, in part, proceeded by necessity, with LAANE serving as the nodal point in a broader network and thus well-positioned to assimilate the views of coalition members and present a unified point of view to the lawyers. However, the lack of formal specification of any type of governance structure within the coalition format complicated the lines of client communication.

This fluidity was apparent in the ways that the other members of the legal team perceived the “clients” to whom they owed allegiance. Pettit viewed himself as LAANE’s lawyer and dealt with Madeline Janis as the ultimate decision maker.⁴¹⁴ John Grant, for his part, viewed his role less as legal counsel than as an officer of the union accountable to its membership (and leaders) and making decisions based on how campaign actions would impact the broader labor movement. Feinberg was on retainer with the UFCW, where she communicated with its president, Rick Icaza, and John Grant; she was also on retainer with LAANE, where she dealt primarily with Madeline Janis. When conflicts arose, she let the organizations work them out and then pursued the commonly agreed upon strategy.⁴¹⁵ Hecht was working in his personal capacity in an advisory role; thus, he did not have a letter of engagement with any specific client.⁴¹⁶

2. Client-Community

The multiple and intersecting strands of lawyer-client relationships map onto broader divisions between clients and the “community,” suggesting how difficult it is for public interest lawyers to be accountable to the community at large, rather than a particular interest group within it. Indeed, Wal-Mart labor campaigns generally expose rifts between class- and race-based conceptions of community—rifts that Wal-Mart deliberately exploits as a way to weaken labor opposition to its Supercenter plans. Thus, in Inglewood, Wal-Mart was able to drive a wedge between the labor-backed CBI and more traditional African American groups like the Urban League and NAACP by playing upon historical antagonisms. This strategy, replicated in other communities across the country,⁴¹⁷ makes it difficult for lawyers to consider themselves as representing working class communities of color in their fight against Wal-Mart, rather than choosing sides in an intra-community dispute over labor versus racial solidarity.

Big-box battles expose other community fault lines as well. In Inglewood, there were divisions between residents based on their

413. Telephone Interview with Jan Chatten-Brown, *supra* note 254.

414. E-Mail from David Pettit, Partner, Caldwell Leslie Proctor & Pettit, to Scott Cummings, Professor of Law, UCLA School of Law (Mar. 7, 2007) (on file with author).

415. Telephone Interview with Margo Feinberg, *supra* note 145.

416. Interview with Sean Hecht, *supra* note 261.

417. See GRAY-BARKAN, *supra* note 7, at 10, 13.

identification as consumers to be benefited by Wal-Mart or workers to be harmed. And there are a number of potential conflicts between different community constituencies that would come to the fore if Wal-Mart decided to enter the Los Angeles market, thus triggering intense negotiations over what community benefits Wal-Mart would have to provide to gain city approval. As in the community benefits agreement context, one could imagine organized labor's interests diverging from those of small business owners, environmentalists, and neighborhood organizations. For instance, such groups may wish to prevent big-box development at all cost, while labor may see advantages to conditioning entry on Wal-Mart commitments to provide living wage jobs to local residents. Or the opposite could occur: labor may resist a Supercenter's degradation of labor standards while other groups may support Wal-Mart's promise of local jobs or environmentally conscious design. Moreover, even if all groups are generally supportive of approving Supercenter development with conditions, it is not clear how Wal-Mart should allocate its resources to mitigate community impacts. There will be an upper limit on the amount of money Wal-Mart will commit to mitigation before the project becomes cost-prohibitive. Should those resources go to enhancing wages, supporting local businesses, providing affordable housing for workers, or building green stores to mitigate energy consumption?

Finally, the interests of labor are not monolithic and even among the core groups of the Los Angeles community-labor alliance, fissures have emerged around questions of strategy and technique. Specifically, though the UFCW and LAANE continue to collaborate on the Los Angeles Grocery Worker and Community Health campaign, which is focused on eliminating the two-tier wage structure in the grocery industry and bringing more groceries into communities of color, there are differences in emphasis and approach that complicate their relationship. The UFCW, given its mandate, has tended to focus more directly on how Wal-Mart affects union density in the grocery industry, while LAANE's broader organizational focus has led it to attend to wider concerns about health, housing, and the environment. As a tactical matter, the UFCW and LAANE use distinct approaches, with the union more invested in helping to win political influence by supporting candidates in electoral campaigns, and LAANE emphasizing grassroots organizing and coalition building. However, despite their differences, the two groups have taken steps to build closer ties and, as a result, there are now two UFCW members who are on staff at LAANE to coordinate community organizing and training around the Grocery Worker and Community Health campaign. As this suggests, the union is actively seeking to expand its constituency to reach beyond its traditional membership as part of labor's broader effort to reinvigorate the movement. In response, other community groups may decide to subsume their interests under labor's broader agenda to the extent that they view

organized labor as one of the only viable political forces for progressive change. Yet as organized labor attempts to walk the tight rope of building ties to non-labor constituencies while still advancing core labor interests, community-labor conflict is bound to be a central feature of the new movement landscape.

CONCLUSION

While the UFCW-LAANE alliance achieved a major victory in Inglewood—and has been successful in extending its anti-big-box activism across the country—important questions remain about how far the site fight will reach as a labor organizing tactic and how effective the use of law to advance labor campaigns will prove. Even its supporters acknowledge that the site fight's reliance on reactive, case-by-case labor organizing and legal advocacy consumes a great deal of time and resources and, particularly in a place like Los Angeles where the large number of separate jurisdictions gives Wal-Mart many potential targets, the site fight strategy could be easily stretched too thin. Labor's focus on city ordinances as a broad shield against Supercenter development responds to the limitations of the site fight, but enacting ordinances on a city-by-city basis is also resource-intensive and politically challenging. Moreover, it is not clear whether labor's focus on local policy reforms will, in the long term, augment its economic power or if the current generation of labor leaders is simply falling into the same trap of privileging legal reform over sustained collective action that critics claim caused the decline of the movement in the past century.

Yet labor's victory in Inglewood has produced important benefits—both symbolic and real—for the labor movement. As a symbol of labor's ability to battle Wal-Mart on its own terms, Inglewood provided a counter-narrative to the dominant story of labor's decline and did some damage (however small) to Wal-Mart's aura of impregnability. The publicity from the site fight galvanized attention from labor and community activists across the country, feeding into new campaigns and raising the national visibility of groups like LAANE, which has assumed a prominent national role in disseminating organizing models and supporting anti-big-box drives. Inglewood also reinforced an activist conception of city government in which labor and community stakeholders play important parts in shaping local development decisions. But the win in Inglewood was not merely symbolic. It did, in fact, block Wal-Mart's entrance into Los Angeles and has strengthened the UFCW's hand in its new round of negotiations against the big grocery store chains. Thus, the Inglewood story matters not just as an allegory of labor smiting the mighty Wal-Mart foe, but as a real-world tale of how local advocacy can recalibrate the legal playing field in ways that enhance worker power.

The Inglewood case should also matter for those who care about the role of lawyers in social change activism. The portrait of lawyering that emerged from the Inglewood study was one attuned to movement goals and deferential to client wishes. The lawyers were selected by labor groups because their technical legal expertise was viewed as crucial to advancing broader campaign goals and, in fact, was deployed in ways that contributed to the Inglewood ballot-box victory and the enactment of the subsequent big-box laws. This portrait contrasts sharply with the dominant post-civil rights view of public interest lawyers as agents of movement cooptation. It also accords with the picture of lawyering for companies like Wal-Mart, which use their vast resources to retain the best lawyers money can buy in order to aggressively pursue their economic interests through law. As labor attempts to meet this corporate challenge head on, the legal arena will therefore remain a central field of contestation and—as Inglewood underscores—the role of lawyers will continue to be critical to labor's attempt to rebuild its organizational base and reenergize its economic agenda.